81-1028

Office - Supreme Court, U.S.
FILED
DEC 1 1981
ALEXANDER L. STEVAS
CLERK

No. 81-_____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

ANNA WILLIAMS,

Appellant,

—v.—

WILLIAM WILLIAMS,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW HAMPSHIRE

JURISDICTIONAL STATEMENT

ANTHONY N. DEL ROSSO, ESQ.
Attorney for Appellant
146 Old Country Road
Mineola, New York 11501
(516) 747-0400

RONALD J. CHISENA, ESQ.
Associate Counsel to
ANTHONY N. DEL ROSSO, ESQ.
146 Old Country Road
Mineola, New York 11501
(516) 747-0400

QUESTIONS PRESENTED

Appellant, a nondomiciliary and nonresident of New Hampshire, was served pursuant to a court order under New Hampshire Statute RSA 458:9 with a libel for divorce in the State of New York by certified mail and publication. Appellant did not appear in New Hampshire in person or by attorney. The Superior Court of New Hampshire, Rockingham County, granted a divorce to appellee, a domiciliary of New Hampshire for more than one year, and further divested appellant of marital property, both real and personal, which she either owned jointly with appellee or solely in her own name. The Superior Court found that in personam jurisdiction existed over appellant under New Hampshire's long arm statute, RSA 510:4. The Supreme Court of New Hampshire affirmed the holding of the Superior Court but based its finding of in personam jurisdiction under New Hampshire's traditional divorce

residency statute, RSA 458:5, which when combined with New Hampshire's divorce service statute, RSA 458:9, was held to be the basis for in personam jurisdiction over the nonresident appellant.

This appeal presents the following questions:

1. Are New Hampshire statutes RSA 458:5 and RSA 458:9, construed by the Supreme Court of New Hampshire, in an action for divorce and division of marital property to yield in personam jurisdiction over a nonresident, nonappearing spouse not served in the forum state, impermissibly vague and thereby violative of the Due Process Clause of the Fourteenth Amendment of the United States Constitution?

2. Did the state court err in failing to follow the decisions of this Court in Estin v. Estin, Armstrong v. Armstrong and Vanderbilt v. Vanderbilt in holding that a divorce residency statute and a divorce

service statute can in combination yield in personam jurisdiction over a nonresident in an action for divorce and division of marital property?

3. Given the fact that appellee sought relief at the trial level of a return of marital property to status quo ante and noticed appellant to that effect, was procedural due process accorded to appellant when the trial court rendered relief in the form of a marital property division without regard to when the property had been acquired?

4. Did New Hampshire's exercise of in personam jurisdiction over the appellant violate the Due Process Clause of the United States Constitution via the utilization of a long arm statute which required no contacts between the defendant, forum and litigation, and further, was the minimum contacts analysis of International Shoe v. Washington, and its progeny, misapplied by the New Hampshire

Supreme Court's consideration of contacts which did not give rise to the cause of action?

PARTIES TO THE PROCEEDINGS BELOW

All of the parties appearing in the Supreme Court of New Hampshire are listed in the caption.

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDINGS BELOW..... iv

TABLE OF AUTHORITIES..... vii

DECISIONS OF THE COURT BELOW..... 1

JURISDICTIONAL BASIS OF THIS APPEAL... 1

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED..... 2

STATEMENT OF THE CASE..... 3

Statement of Facts..... 3

Prior Proceedings..... 5

THE QUESTIONS PRESENTED ARE SUBSTANTIAL 12

I. The Application By The Supreme Court Of New Hampshire Of New Hampshire Statutes RSA 458:5 And RSA 458:9 In A Divorce Action To Obtain In Personam Jurisdiction Over Appellant, A Nonresident, Nonappearing Spouse Who Was Not Served In The Forum, Is Repugnant To The Due Process Clause Of The Fourteenth Amendment To The United States Constitution As Said State Statutes, As So Construed By New Hampshire's Highest Court, Are Impermissibly Vague And Therefore Unconstitutional..... 12

II. The Decision Of The Supreme Court

Of New Hampshire Squarely Conflicts With The Decisions Of This Court In Estin v. Estin, Armstrong v. Armstrong And Vanderbilt v. Vanderbilt... 32

III. Appellant Was Not Accorded Adequate And Due Notice Of The Relief Actually Rendered By The Trial Court In The Form Of A Marital Property Division And Thus The Procedural Due Process Requirements Of The Fourteenth Amendment Have Not Been Met..... 50

IV. The New Hampshire Supreme Court's Exercise Of In Personam Jurisdiction Under RSA 458:5 And 458:9 Failed The Federal Minimum Contacts Test Of International Shoe And Its Progeny By The Predication Of Jurisdiction On The Plaintiff's And Not The Defendant's Contacts With The Forum. The Court Further Misapplied The Federal Minimum Contacts Analysis By Considering Contacts Which Did Not Give Rise To The Cause Of Action Sued Upon..... 52

CONCLUSION..... 65

APPENDIX..... A-1

TABLE OF AUTHORITIES

Cases	Pages
A.F. Briggs Co.v. Starrett Corporation 329 A.2d 177(Maine,1974)	58n.11
American Surety Co. v. Baldwin 287 U.S.156 (1932)	2,11
Armstrong v. Armstrong, 350 U.S.568(1955)	7,8,32,34,38-41,42 43,44,44n.6,45n.6, 46n.7,47,48
Boutilier v. Immigration & Naturalization Service, 387 U.S.118	13
Breen, In re Marriage of 560 S.W.2d 358	62
Brinkerhoff-Farris Trust & Savings Co. v. Hill 281 U.S. 673(1930)	2
Duford v. Duford 119 N.H. 515,403 A.2d 431 (1979)	23-26,28
Elliot v. Cabeen, 224 F. Supp. 50	58n.11
Elliot v. U.S. Steel Export Co., 186 F. Supp. 57 (1960)	58n.11
Estin v. Estin, 334 U.S. 541 (1948)	7,8,32,34-36,42,43, 44,44n.5,46n.7,47,48
Fliter v. Fliter 383 So.2d 1084 (Miss. 1980)	64n.12
Great Northern Railway Co. v. Sunburst Oil & Refining Co. 287 U.S.358(1932)	2

Hall, Morse, Gallagher & Anderson v. Koch & Koch, 119 N.H. 639,406 A2d 962...57n.10

Hines v. Clendenning,465 P.2d 460 (1970).....64n.12

International Shoe v. Washington, 326 U.S. 310 (1945) 8,14,45n.7,47,49,53, 54,55,56,58,59,60

Jordan v. De George, 341 U.S.223(1951)..12-13

Keyishian v. Board of Regents, 385 U.S. 589 (1967).....13

Kulko v. California Superior Court 436 U.S. 84.....21,32,63

Lawrence v. State Tax Commission, 286 U.S. 276.....10-11

Meredith v. Meredith, 226 F.2d 257(1953)...36

Missouri ex rel. Missouri Insurance Co. v. Gehner, 281 U.S. 313 (1930).....2

Mizner v. Mizner, 439 P.2d 679 (1968).....58n.11,64n.12

Neblett v. Carpenter, 305 U.S. 297 (1938) reh den 305 U.S. 675.....13

Nickas v. Nickas, 113 N.H. 261, 306 A.2d 51 (1973).....26-28

Ohio ex rel. Bryant v. Akron Metropolitan Park District, 281 U.S. 74 (1930)..;.....2

Old Dearborn Distributing Co. v. Seagram-Distillers Corp., 299 U.S. 183 (1936).....13

Pulson v. American Rolling Mill Co., 170 F.2d 193 (1948).....58n.11

Rinderknecht, In re Marriage of, 367 N.E.2d 1128 (Court of Appeals, Ind. 1977).....64n.12

Rosenblum v. Judson Engineering Corp., 99 N.H. 267, 109 A.2d 558.....28-30

Saunders v. Shaw, 244 U.S.317 (1917).....2

Shaffer v. Heitner, 433 U.S. 186.....55

Small Co. v. American Sugar Refining Co., 267 U.S. 233 (1925).....13

State Tax Commission v. Cord, 404 P.2d 422 (Sup. Ct., Nevada, 1965).....58n.11

Vanderbilt v. Vanderbilt, 354 U.S. 416 (1957) 7,8,32,34,36-38,39n.2 40n.3,41,42,43,44,44 n.5,46n.7,47,49

Williams v. State of North Carolina, 317 U.S. 287.....34

Woodring v. Hall, 438 P.2d 135(1968)...57n.11

World-Wide Volkswagen Corporation v. Woodson,444 U.S. 286 (1980).....14,41-42,58

Constitutional Provisions and Statutes

Constitution of the United States

U.S. Const. Amend. 14 §1.....3,31,54,64 Apdx. A-1

United States Statutes

28 U.S.C. §1257 (2) 2,10,11

28 U.S.C. §1257 (3).....2

28 U.S.C. §2103.....2

New Hampshire Statutes:

RSA 458:4.....3,8,16,17,18
Apdx. A-1

RSA 458:5 3,8,9,10,12,15,16,17,18,19,20,22
23,24,25,26,27,28,30,31,33,44
n.5,n.6,45,46,47,48,49,52,53,
56,59
Apdx. A-1

RSA 458:6.....3,16,17
Apdx. A-2

RSA 458:9.....3,8,9,10,12,15,16,17,19,20,22,
23,24,25,26,27,28,30,31,44n.5,
n.6,45,46,47,48,49,52,56,59
Apdx. A-2

RSA 510:4.....3,7,9,20,29,56n.10,59
Apdx. A-3

R.L. (Revised Laws) c.387 §4-6.....29-30

California Statutes

Civ. Proc. Code §410.10.....21

Florida Statutes

F.S.A. §61.021.....3,44n.6
Apdx. A-8

F.S.A §49.011.....3,44n.6
Apdx. A-9

F.S.A §48.193.....3,48n.9
Apdx. A-9

Idaho Statutes

Code of Civ. Proc. § 5-514(e).....56n.10

Illinois Statutes

Rev. Stats. ch 110 §17(1)(e).....56n.10

Kansas Statutes

Code Civ. Proc. §60-308(b) (8).....56n.10

Maine Statutes

14 M.R.S.A.§704-A (2) (G).....56n.10

Massachusetts Statutes

M.G.L.A. c.223 A, §3(g).....56n.10

Nevada Statutes

Nevada Revised Statutes

N.R.S. §125.020 .....3,44n.5
Apdx. A-3

Nevada Complied Laws Supplement (1931-41)

N.C.L. §8582.....3,44n.5
Apdx. A-5

Nevada Revised Statutes

N.R.S. §14.065.....3,48n.8
Apdx. A-7

New York Statutes

Civil Practice Law & Rules 302 (b).....56n.10

Oklahoma Statutes

Title 12, Okla. Stats. §1701.03 (a)(7).56n.10

Other Authorities:

Law Review Articles

Kurland, The Supreme Court, The Due Process Clause and the In Personam Jurisdiction, of State Courts, 25 Univ. of Chi., Law Review 569 (1958).....25

Note, Extending Minimum Contacts to Alimony: Mizner v. Mizner, 20 Hastings Law Review, 361 (1968).....64n.12

Traynor, Is This Conflict Really Necessary? 37 Tex. L. Rev. 657, (1959).....57n.11

Restatement of Laws

Restatement (Second) Conflict of Laws..58n.11

Treatises

Clark, Homer H.Jr., Domestic Relations 1968.....42n.4

DECISIONS OF THE COURT BELOW

The unreported opinion of the Supreme Court of New Hampshire dated August 10, 1981 is reproduced in the Appendix at pp. A-1 to A-10. The unreported order of the Supreme Court of New Hampshire denying appellant's motion to reargue is set forth in the Appendix at page A-42.

JURISDICTIONAL BASIS OF THIS APPEAL

This is a suit wherein appellant questioned the validity of a state statute on the ground of its being repugnant to the Constitution of the United States, and the decision was in favor of its validity. This is an appeal from a final judgment of the Supreme Court of New Hampshire entered August 10, 1981, as amended by Order dated September 2, 1981 of the Supreme Court of New Hampshire denying appellant's petition for a rehearing. A Notice of Appeal was filed with the Clerk of the Supreme Court of New Hampshire on September 16, 1981.

This Court has jurisdiction of this appeal by virtue of 28 U.S.C. § 1257(2).

In support of this assertion of jurisdiction appellant cites the following cases: Saunders v. Shaw, 244 U.S. 317, 320 (1917); Ohio ex rel. Bryant v. Akron Metropolitan Park District, 281 U.S. 74, 79 (1930); Missouri ex rel. Missouri Insurance Co. v Gehner, 281 U.S. 313, 320 (1930); Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U.S. 673, 678 (1930); American Surety Co. v. Baldwin, 287 U.S. 156, 164 (1932); Great Northern Railway Co. v. Sunburst Oil & Refining Co., 287 U.S. 358, 367 (1932).

Alternatively, the Court should treat this jurisdictional statement as a petition for a writ of certiorari pursuant to 28 U.S.C. §§2103 and 1257(3), and the petition should be granted.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The text of the following provision of the United States Constitution and state

statutes, insofar as pertinent, is set out in the Appendix.

U. S. Const. Amend. XIV, § 1 (Apdx. A-1)

New Hampshire Statutes

RSA 458:4 (Apdx. A-1)

RSA 458:5 (Apdx. A-1)

RSA 458:6 (Apdx. A-2)

RSA 458:9 (Apdx. A-2)

RSA 510:4 (Apdx. A-3)

Nevada Statutes

N.R.S. § 125.020 (Apdx. A-3)

N.C.L. (Nevada Compiled Laws Supplement 1931-1941) § 8582 (Apdx. A-5)

N.R.S. § 14.065 (Apdx. A-7)

Florida Statutes

F.S.A. § 61.021 (Apdx. A-8)

F.S.A. § 49.011 (Apdx. A-9)

F.S.A. § 48.193 (Apdx. A-9)

STATEMENT OF THE CASE

The Facts

On February 14, 1969, the parties were married in the State of New York.

Prior and during the entire marriage, the appellant had been a resident and domiciliary of the State of New York. The husband had, prior to the marriage, been a resident of the State of New Hampshire. After their marriage, both parties maintained their marital domicile in the State of New York. In 1971 appellee unilaterally decided that he no longer wanted to live in New York State with appellant and separated from her, taking up domicile in New Hampshire. From 1971 to 1979 both husband and wife visited each other on occasions. The appellant in her visits to New Hampshire never established residence or domicile in New Hampshire.

This suit was instituted on October 4, 1979 in the Superior Court of New Hampshire, Rockingham County (Docket No. E-1771-79) by the appellee seeking a judgment of divorce. Appellant was served pursuant to a court order with a libel for divorce by certified mail at her domicile and

residence in the County of Nassau, State of New York and by the publication of the divorce libel in a newspaper published in the County of Nassau, State of New York. Appellant does not contest the fact of constructive service by certified mail and by publication. Appellant did not appear in person or by attorney in the divorce action. No property, real or personal, of appellant having its situs in New Hampshire was ever attached or sequestered by any process.

Prior Proceedings

An uncontested divorce was granted to appellee on May 16, 1980 in the Superior Court of New Hampshire, Rockingham County. The divorce decree (Apdx. A-23), in addition to severing the marital relationship of the parties, awarded title to appellee of all jointly owned marital property, except for 101 shares of Occidental Petroleum stock which was jointly owned, but which had been solely owned by appellant

prior to their marriage. The decree awarded to appellee jointly owned marital property and certain property solely owned by appellant having a value in excess of $600,000.00. The decree of the Superior Court evidences that the Court was exercising in personam jurisdiction over appellant by virtue of New Hampshire long arm statute RSA 510:4 (Apdx. A-3).

Appellant, on June 13, 1980, appeared specially and filed a motion in the Superior Court, Rockingham County to stay and set aside the decree of divorce based on lack of in personam jurisdiction. The motion was denied. There was no written opinion. By a notice of appeal filed on June 13, 1980 in the Supreme Court of the State of New Hampshire and a petition for a writ of certiorari filed in said Court on October 20, 1980, the appellant challenged the superior court decrees.

In the Supreme Court, appellant argued that (1) In the context of a marital property

division in a divorce action, the due process clause of the Fourteenth Amendment demands that in personam jurisdiction over a person be acquired in order to divest said person of title to personalty and realty located in the forum state. This conclusion was further argued to be mandated by this Court's decision in Estin v. Estin, Armstrong v. Armstrong and Vanderbilt v. Vanderbilt.

(2) The lower court's reliance upon RSA 510:4, New Hampshire professed long arm statute, was inapplicable to appellant who was a nonresident of New Hampshire and who was served with process outside the forum and who did not appear in the action in person or by attorney.

(3) Assuming RSA 510:4 was applicable

(a) given the fact that appellee sought relief at the trial level of a return of marital property to status quo ante and noticed appellant to that effect, appellant was not accorded procedural due process when the trial court rendered relief in the form

of a marital property division without regard to when the property was acquired;

(b) appellant did not have sufficient contacts with the forum with respect to the cause of action for divorce and marital property division so as to satisfy the "minimum contacts" test of International Shoe v. Washington and its progeny.

(4) New Hampshire statute RSA 458:5 in conjunction with RSA 458:9 are limited in their reach, intent and purpose by RSA 458:4, that is, their utilization concerns solely the state court's jurisdiction to grant a divorce. Appellant drew into question the constitutionality of RSA 458:5 and 458:9 in anticipation that the Supreme Court of New Hampshire would possibly consider said statutes as yielding personal jurisdiction and argued that the validity of such construction and application to appellant's case are barred by this Court's holdings in Estin v. Estin, Armstrong v. Armstrong, and Vanderbilt v. Vanderbilt.

The Supreme Court of New Hampshire in an opinion dated August 10, 1981 (Apdx. A-11) affirmed the holding of the trial court that it had in personam jurisdiction over appellant but declined to base such findings under RSA 510:4, the state's professed long arm statute. The Supreme Court, although finding that appellant was a nondomiciliary and nonresident of New Hampshire, nevertheless found that in personam jurisdiction was present under the combination of RSA 458:5, the state's traditional divorce residency statute, with RSA 458:9, the state's traditional divorce service statute. (Apdx. A-13)

The Supreme Court did consider RSA 458:5 in conjunction with RSA 458:9 as long arm statutes which did yield in personam jurisdiction over the nonresident appellant. This construction of RSA 458:5 and 458:9, as yielding in personam jurisdiction over nonresidents in a divorce action, was novel and could not reasonably have been

anticipated by appellant prior to the appeal to the Supreme Court of New Hampshire. The first opportunity which appellant had to attack the constitutional infirmity of this novel construction of RSA 458:5 and 458:9 was in a timely filed petition for rehearing which was filed with the New Hampshire Supreme Court on August 20, 1981 (Apdx. A-43 to A-65).

The petition for rehearing clearly expresses the argument that the state court's construction of RSA 458:5 and 458:9 as yielding in personam jurisdiction over a nonresident in a divorce action renders said statutes impermissibly vague and thus violative of the substantive due process guarantees of the Fourteenth Amendment.

The Supreme Court of New Hampshire by order dated September 2, 1981 denied appellant's petition for rehearing. No written opinion supported the order but such factor cannot destroy the right to appeal under 28 U.S.C. § 1257 (2). Lawrence v. State

Tax Commission, 286 U.S. 276, 282-283.

This Court has held in a consistent line of cases that where a federal claim arises from an

> "[U]nanticipated act of the state Supreme Court in giving to a statute a new construction which threatened rights under the Constitution", American Surety Co. v. Baldwin, 287 U.S. 156, 164

the raising of said constitutional challenge to the state's statute, as construed, in a timely filed petition for rehearing to the state court preserves the federal question and adequately grounds the appeal to this Court under 28 U.S.C. § 1257(2).[1]

Mr. Justice Brennan by Order dated September 16, 1981 (Apdx. A-70) granted temporary stay of the state court mandate. Mr. Justice Brennan by Order dated September 29, 1981 (Apdx. A-72) continued the stay during the appellate process in this Court.

---

1. For additional authority, see cases cited supra at p. 2 in the section entitled "Jurisdictional Basis Of This Appeal."

THE QUESTIONS PRESENTED ARE SUBSTANTIAL.

I. THE APPLICATION BY THE SUPREME COURT OF NEW HAMPSHIRE OF NEW HAMPSHIRE STATUTES RSA 458:5 AND RSA 458:9 IN A DIVORCE ACTION TO OBTAIN IN PERSONAM JURISDICTION OVER APPELLANT, A NONRESIDENT, NONAPPEARING SPOUSE WHO WAS NOT SERVED IN THE FORUM, IS REPUGNANT TO THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AS SAID STATE STATUTES, AS SO CONSTRUED BY NEW HAMPSHIRE'S HIGHEST COURT, ARE IMPERMISSIBLY VAGUE AND THEREFORE UNCONSTITUTIONAL.

This Court has recognized that a noncriminal statute is unconstitutionally vague under the due process clause, where its language does not convey sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices, or stated otherwise, where its language is such that men of common intelligence must necessarily guess at its meaning, Jordan v. De George, 341 U.S. 223

(1951); Old Dearborn Distributing Co. v. Seagram-Distillers Corp. 299 U.S. 183 (1936); Neblett v. Carpenter, 305 U.S. 297 (1938), reh den 305 U.S. 675; Keyishian v. Board of Regents, 385 U.S. 589 (1967). There can be no doubt that the "void for vagueness" doctrine applies to civil as well as criminal actions. Boutilier v. Immigration and Naturalization Service 387 U.S. 118, 123; Small Co. v. American Sugar Refining Co. 267 U.S. 233, 239 (1925).

Appellant does not now and did not in the Supreme Court of New Hampshire challenge the jurisdiction of the Superior Court, Rockingham County, to have divorced the parties. The challenge at all times was to the statutory authority, that is, jurisdiction of the courts of New Hampshire to divide the parties' property. Appellant alleged that the property aspect of the decree was void because the court did not have in personam jurisdiction over her under any state statute.

The granting of constitutional adjudicatory power to courts to reach nonresident spouses can be accomplished only by properly constructed state statutes. Cf. World-Wide Volkswagen Corporation v. Woodson, 444 U.S. 286, 289-290 (1980). The analysis of many cases which have as their issue whether the nonresident can be made subject to a state's exercise of personal jurisdiction over him revolves around the question of the application of the "minimum contacts" test of International Shoe v. Washington 326 U.S. 310 and its progeny. However, it is submitted that in all such cases a state statute which authorizes the utilization of in personam jurisdiction over a nonresident in the circumstances of the particular case, is prerequisite.

The Supreme Court of New Hampshire held that the Superior Court had in personam jurisdiction over appellant while acknowledging that she was a nonresident of New Hampshire and that she had not

appeared in the action. In personam jurisdiction was held to be present under the state's traditional divorce statutes, that is, RSA 458:5 (divorce residency statute) and RSA 458:9 (divorce service statute). The court held that:

> "Because the plaintiff met the domicile requirements of RSA 458:5 III and the defendant was served according to RSA 458:9, the court had in personam jurisdiction over the defendant."
>
> (Apdx. A-18)

The Supreme Court of New Hampshire, simply put, construed RSA 458:5 and RSA 458:9 as purported long arm statutes, holding that said statutes do yield in personam jurisdiction over a nonresident defendant who is not served in New Hampshire and who does not appear in a divorce action which adjudicates the property aspects of the marriage. Appellant does not assert that this Court should review the construction placed on RSA 458:5 and RSA 458:9 by the Supreme Court of New Hampshire. However, this Court is bound to test the validity

of the New Hampshire Supreme Court's construction in the context of whether said statutes, as construed, comply with the fair notice and warning requirements of substantive due process. The appellant and other nonresidents similarly situated did not have fair notice and warning that the language of RSA 458:5 and 458:9, within the meaning of the principles of those cases in this Court which have established the rules for testing for vagueness, could possibly be construed as long arm statutes purporting to assert personal jurisdiction over a nonresident not served in the state.

The state court in basing in personam jurisdiction upon RSA 458:5 and 458:9 totally failed to cite New Hampshire statute RSA 458:4 (Apdx A-1) It is absolutely clear that the intent of RSA 458:5 and RSA 458:6 is to be limited by RSA 458:4, that is, that RSA 458:4 is a source of jurisdiction over the marital status only RSA 458:4 was not intended to be and is not

a source of in personam jurisdiction over a nonresident. It is a source of jurisdiction for the courts to grant a divorce.

Within the context of the facts of this case, could a reasonable person of common intelligence look to New Hampshire statutes RSA 458:4, RSA 458:5, RSA 458:6 and RSA 458:9 and then reach the conclusion that said statutes are jurisdictional long arm statutes which yield personal jurisdiction over a nonresident? Appellant submits that the only justifiable warning and notice which said statutes give, within the context of this case, is as follows:

(1) RSA 458:4 establishes that the court's jurisdiction to grant a divorce to appellee is limited to those cases where it has jurisdiction over the appellant and appellee under RSA 458:5 and of the alleged cause of action under RSA 458:6.

(2) Jurisdiction over appellant and appellee is obtained under RSA 458:5 III by virtue of the appellee having been

domiciled in New Hampshire for at least one year next preceding the time when the action was commenced against appellant. The nature of the jurisdiction obtained is restricted by the clear and unambiguous language of RSA 458:4, that is, if jurisdiction over the parties is obtained by virtue of RSA 458:5, the court's jurisdiction is still limited by RSA 458:4 to the power to grant a divorce. Indeed RSA 458:4 uses the very words "limitation" and "limited" when referring to the court's jurisdiction to grant a divorce. By the mere domicile of the appellee herein in New Hampshire for the requisite statutory period, jurisdiction over both parties is obtained sufficient only for the court under RSA 458:4 to grant a divorce to appellee and not to affect her marital property rights. The court possesses no additional jurisdictional power over appellant because appellee meets the domicile requirements of RSA 458:5 III.

(3) RSA 458:9 merely provides a method of service of the divorce libel and it can be accomplished other than by personal service. As this statute pertains to the service of divorce libels it provides warning to the nonresident that the court still possesses sufficient jurisdiction over the marital "res" solely to grant a divorce to appellee, assuming appellee has satisfied RSA 458:5 III, even though appellant cannot be personally served in New Hampshire.

RSA 458:5 and more particularly 458:5 III, upon which this case is based, and 458:9 are not addressed to any contacts, ties or relations of the defendant to the forum.

As to the issue of the instances where New Hampshire courts can acquire in personam jurisdiction over a nonresident defendant, RSA 458:5 gives absolutely no warning to the nonresident defendant as to what conduct of the nonresident defendant would subject him to long arm jurisdiction.

The only contacts with New Hampshire that

RSA 458:5 III refers to a plaintiff's forum contacts as a domiciliary. A defendant's forum contacts are not provided for.

This is in marked contrast to RSA 510:4 (Apdx.A-3), the professed New Hampshire long arm statute, which clearly on its face pertains to nonresident individuals and prescribes those forum related minimun contacts which will subject the nonresident to in personam jurisdiction, but only as to those acts specifically enumerated in the statute. This is also in marked contrast to every other state's long arm statute presently in force. No state's long arm statute, other than this construction placed upon RSA 458:5 and RSA 458:9 by the New Hampshire Supreme Court in the case at bar purports to acquire long arm jurisdiction over a nonresident defendant based upon a measurement of the plaintiff's contacts with the jurisdiction.

Where a state by its long arm statute allows its courts to "exercise jurisdiction

on any basis not inconsistent with the constitution of this state or of the United States" such as §410.10 of the California Civil Procedure Code and others, the emphasis on the nonresident defendants contacts with the forum state is implicitly provided within the "minimum contacts" rationale of International Shoe and its progeny:

> " [T]he constitutional standard for determining whether the State may enter a binding judgment against appellant here is that set forth in this Court's opinion in International Shoe v. Washington, supra; that a defendant 'have certain minimum contacts with [the forum State] such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice." ' 326 US, at 316, . . . quoting Milliken v. Meyer, supra [311 U.S. 457 at 462]. . . . While the interests of the forum State and of the plaintiff in proceeding with the cause in the plaintiff's forum of choice are, of course, to be considered, see McGee v. International Life Ins. Co. 355 US 220, 223 . . . an essential criterion in all cases is whether the 'quality and nature' of the defendant's activity is such that it is 'reasonable' and 'fair' to require him to conduct his defense in that State. International Shoe Co. v. Washington, supra, at 316-317, 319. . .
> Accord, Shaffer v. Heitner, supra, [433 U.S. 186, at 207-212]."
>
> (Kulko v. California Superior Court 436 U.S. 84, 92)

Furthermore, a statute such as RSA 458:9 which merely pertains to a method of service, is grossly insufficient to meet this statutory standard of being a long arm statute.

RSA 458:5 is impermissibly vague in that it fails to provide any notice whatsoever to a nonresident defendant that any act or contact which he or she may have with New Hampshire will cause in personam jurisdiction to exist. RSA 458:9 is merely a method of service statute and not a jurisdictional service statute. Neither of said statutes or their combination can yield a construction that, when applied to a particular set of facts such as in the instant case, would not be violative of the substantive due process guarantees of the Fourteenth Amendment to the United States Constitution.

The vagueness in RSA 458:5 and RSA 458:9 has not been removed by any appropriate construction of said statutes by the Supreme Court of New Hampshire. In the decision below, the court stated:

> "The defendant argues that New Hampshire has no statute that provides for in personam jurisdiction over nonresident defendants in divorce proceedings. We disagree. In Duford v. Duford, 119 N.H. 515, 516, 403 A.2d 431, 432 (1979), this court held that RSA 458:5 provides in personam jurisdiction when service is made in accordance with RSA 458:9." (Apdx.A-17)

Appellant contends that the Duford case cannot be deemed to have provided notice to nonresidents that RSA 458:5 provides personal jurisdiction over a nonresident of New Hampshire in a divorce action where service is made in accordance with RSA 458:9. The facts of Duford will evidence that said case is clearly distinguishable from the case now before this court. In Duford, plaintiff was a lifelong resident of New Hampshire. Defendant's actual address was unknown at time of service,

but his last known address was in care of his parents in West Springfield, New Hampshire, and the court held defendant was domiciled in New Hampshire. The divorce libel was served pursuant to RSA 458:9 by sending it to defendant's last known address in New Hampshire. The Supreme Court 119 N.H. at p. 516, 402 A.2d at p. 432, held that:

> "The record before us shows that New Hampshire is still his domicile, although he may presently be elsewhere."
>
> (Emphasis appellant)

Based upon this finding, it is submitted that the Duford Court found that as plaintiff met the requirements of RSA 458:5 III (being domiciled in New Hampshire for at least one year prior to commencement of divorce action) it then could hold:

> "Plaintiff meets this requirement and service being properly made in accordance with RSA 458:9, personal jurisdiction attaches under RSA 458:5."
>
> (119 N.H. at p. 516, 403 A.2d at p. 432)

It is submitted that the Duford Court

held as it did due to the finding that defendant was a domiciliary of New Hampshire and thus, no matter where a domiciliary is served, whether in New Hampshire or outside the state, and as long as service is made by personal delivery or by a mode of service approved by the court under RSA 458:9, personal jurisdiction attaches. However, this analysis has no consequent application when the defendant is a non-resident of New Hampshire. As stated in Kurland, The Supreme Court, The Due Process Clause and the In Personam Jurisdiction of State Courts 25 Univ. of Chi. Law Rev. 569,575:

> "Domicile has served state courts as a constitutional base for asserting jurisdiction over absent defendants ... [citing Milliken v. Meyer, 311 U.S.457 (1940)]

As domicile of defendant Michael Duford is the constitutional basis for the finding of in personam jurisdiction in Duford, that case cannot be authority for any allegation that it removed whatever vagueness RSA 458:5 contains. Appellant can only be charged

with the knowledge that the Duford decision is applicable solely to domiciliaries of New Hampshire whose present whereabouts are unknown and over whom personal jurisdiction will attach in a divorce action if plaintiff meets the domicile requirements of RSA 458:5 and service is made upon defendant in accordance with RSA 458:9.

Furthermore, appellant asserts that if she is charged with constructive knowledge of Duford v. Duford, supra. at the time she was served with the divorce libel in this case in New York, then she is also charged with constructive knowledge of the case of Nickas v. Nickas, 113 N.H. 261, 306 A.2d 51 (1973). In Nickas there was before the court a divorce action commenced by a New Hampshire domiciliary against a domiciliary of Nevada wherein service was made pursuant to a valid court order upon the wife in Nevada. The wife was served pursuant to RSA 458:9 in conjunction with the lower court's "jurisdiction of the parties"

within the meaning of RSA 458:5 III. Did this give the husband in personam jurisdiction over the defendant, a Nevada domiciliary? It did not. The Supreme Court in Nickas, 113 N.H.at p. 266,held:

> "The New Hampshire court did not purport to adjudicate Eleanor's (the nondomiciliary of New Hampshire) right to alimony or support, and it then had no personal jurisdiction over her. Vanderbilt v. Vanderbilt, 354 U.S. 416, 1 L.Ed.2d 1456, 77 S.Ct. 1360 (1957); Armstrong v. Armstrong, 350 U.S. 568, 100 L.Ed. 705, 76 S.Ct. 629 (1956)."

Clearly, if RSA 458:5 in conjunction with RSA 458:9 yielded in personam jurisdiction over nonresidents, it would have yielded in personam jurisdiction over defendant, Eleanor Nickas in the Nickas case, but it does not so yield, and the Nickas court did not construe it to do so. It cannot be argued that the Nickas court found no personal jurisdiction to attach because of defendant's lack of sufficient minimum contacts with New Hampshire. The approach taken by the Court in the instant case to examine state law first, prior to an analysis of the

existence of minimum contacts, to ascertain whether there is a state statute under which personal jurisdiction can be invoked was the approach taken by the Nickas court. The Nickas court did not examine the defendant's contacts with New Hampshire because there was no state statute under which personal jurisdiction could be invoked.

It is obvious therefore that at the time appellant was served with the divorce libel given the nature of the holdings in the Nickas and Duford cases of the Supreme Court of New Hampshire, no just and fair inference could be drawn that RSA 458:5 provided for personal jurisdiction over a nonresident in a divorce case commenced by a plaintiff who was domiciled in New Hampshire for at least one year in order to meet the requirement of RSA 458:5 and wherein service of the divorce libel was made under RSA 458:9.

Appellant must also be charged with constructive notice of the Supreme Court of New Hampshire's holding in Rosenblum v.

Judson Engineering Corp., 99 N.H. 267, 109 A.2d 558(1954) which involved an attempt to obtain in personam jurisdiction over a nonresident individual served outside New Hampshire under R.L. c.387, §§4-6, permitting service outside New Hampshire where service could not be effectuated in New Hampshire, at a time when present RSA 510:4 was not the law. The statute involved is similar in purpose to RSA 458:9 in a divorce case.

The court held:

> "Service upon a nonresident individual must be made in hand within this state in order to subject him to jurisdiction here, except in certain circumstances not applicable in this case. R.L. c.387 §§4-6. A state may by appropriate legislation constitutionally require that a nonresident individual doing business in the state be subjected to its jurisdiction by some method of service other than by service in hand within the state, as to cause of action arising out of the business done there (citations omitted). This power has not been exercised by our legislature. Section 8 of R.L. c.387 relied on by the plaintiff, provides that the court may order 'such notice...as the case requires' when the defendant is a nonresident 'and no mode of serving the writ is prescribed, or service thereof cannot be made in the mode prescribed.' THIS STATUTE WAS ADOPTED IN 1852 AND CONTAINS NO REFERENCE TO JURISDICTIONAL MATTERS SUCH AS ACTS OR CONTACTS OF THE DEFENDANT IN THIS STATE. (citations omitted).

IT WAS NOT INTENDED TO EXPRESS A LEGISLATIVE POLICY THAT NONRESIDENTS ELECTING TO ENGAGE IN BUSINESS IN THIS STATE MUST BE PREPARED TO BE SUBJECT TO SUBSTITUTED SERVICE IN ANY ACTION BROUGHT HERE TO WHICH THE BUSINESS IN THIS STATE GIVE RISE."

(99 N.H. at p. 270; emphasis appellant)

The Supreme Court of New Hampshire had thus clearly held that a statute such as RSA 458:9 which merely provides a manner of service cannot be considered to refer to legislative policy setting forth any jurisdictional matters such as the acts or contacts which the nonresident defendant must have with New Hampshire before a long arm statute permitting service outside New Hampshire could be utilized.

Therefore, it cannot be argued that there were any Supreme Court of New Hampshire cases which, at the time of service of the divorce libel upon appellant, could have conceivably caused any doubt to appellant that RSA 458:5 and 458:9 did not apply to give personal jurisdiction over nonresidents.

Based upon the foregoing, appellant asserts that New Hampshire statutes

RSA 458:5 and 458:9, as construed by New Hampshire's highest court to yield personal jurisdiction over a nonresident defendant in a divorce action who was not served in New Hampshire and who made no appearance in the action, are constitutionally void for vagueness within the meaning of the due process clause of the Fourteenth Amendment of the United States Constitution and, therefore appellant's due process rights under the Fourteenth Amendment were violated.

II THE DECISION OF THE SUPREME COURT OF NEW HAMPSHIRE SQUARELY CONFLICTS WITH THE DECISIONS OF THIS COURT IN ESTIN V. ESTIN, ARMSTRONG V. ARMSTRONG AND VANDERBILT V. VANDERBILT

The due process clause of the Fourteenth Amendment of the United States Constitution demands that in personam jurisdiction over the defendant is required in a divorce action to validly adjudicate defendant's rights and interest in marital property that has not been attached by any court process. In Kulko v. Superior Court supra, at p. 91, this Court held that:

> "The Due Process Clause of the Fourteenth Amendment operates as a limitation on the jurisdiction of state courts to enter judgments affecting rights or interest of non-resident defendants. See Shaffer v. Heitner 433 U.S. 186, 198-200 (1977). It has long been the rule that a valid judgment imposing a personal obligation or duty in favor of the plaintiff may be entered only by a court having jurisdiction over the person of the defendant. Pennoyer v. Neff, 95 U.S. 714, 732-733 (1978); International Shoe Co. v. Washington, supra., 326 U.S. at 316."

A New Hampshire Court's power to decree a

divorce must be based in part upon some ground under New Hampshire statute RSA 458:5 (Apdx.A-1). In the case at bar, the Supreme Court of New Hampshire relied upon RSA 458:5 III as the basis for finding that it had in personam jurisdiction over appellant (Apdx. A-18). As concerning the marital status of of the parties the appellant does not contest that the New Hampshire courts did possess jurisdiction over the "res" of the marriage sufficient to constitutionally affect said marital status and divorce the parties. A novel question is herein presented in that can a state constitutionally use its divorce residency statute in combination with its divorce service statute to yield a result which gives personal jurisdiction over a nonresident defendant in a divorce action who is not served in the forum state and who does not appear in the action.

New Hampshire, in the instant case, is the first state which has utilized its

traditional divorce residency and service statutes as long arm statutes yielding personal jurisdiction over nonresidents.

Appellant contends that utilization of a divorce residency statute and a divorce service statute to obtain personal jurisdiction over a nonresident is not in accord with prior decisions of this court in Estin v. Estin, 334 U.S. 541 (1948); Armstrong v. Armstrong, 350 U.S. 568 (1955); and Vanderbilt v. Vanderbilt, 354 U.S. 416 (1957).

In Estin v. Estin, supra., this Court held that the marriage contract is not a single, indivisible entity but embodies a bundle of rights which are divisible and thus was born the concept of "divisible divorce." This Court had held in Williams v. State of North Carolina, 317 U.S. 287 that the marital status can be terminated by a Court which has jurisdiction over either of the parties. In Estin, the wife sued the husband in New York for a separation and support, both of which were awarded

by the court. The husband then moved to Nevada, establishing a domicile there, and sued the wife for divorce. She was served by publication in New York. Nevada rendered a divorce decree to the husband on the wife's default in appearance. The decree made no provision for alimony. The wife then sued in New York for arrears in support under the New York separation decree and obtained judgment. The husband argued that the Nevada decree was a bar to such relief. This Court held that the divorce in essence was divisible, that is, that Nevada had the requisite jurisdiction over the marital res to divorce the parties, but Nevada's attempt to divest the wife of alimony rights required personal jurisdiction over the wife which Nevada did not have, based upon constructive service outside the forum state. Alimony was considered as being a personal right and one of the financial incidents of the marital relationship clearly distinguishable from the marital status itself.

Further, this Court stated in Estin, supra, at 546, that

> "The fact that the requirements of full faith and credit, so far as judgments are concerned, are exacting, if not inexorable [Sherrer v. Sherrer (US) supra], does not mean, however, that the State of the domicile of one spouse may, through the use of constructive service, enter a decree that changes every legal incidence of the marriage relationship."

The U. S. Court of Appeals, District of Columbia Circuit, in Meredith v. Meredith 226 F.2d 257, 258-59 (1953) succinctly stated the principles enunciated in Estin as follows:

> "Thus the Supreme Court has taught us that the mere marital status, as such, and the rights of consortium can be dissolved by a court having jurisdiction over the plaintiff spouse, but that personal rights of a financial nature, and the corresponding obligations thereunder, can be adjudicated only by a court having jurisdiction over the defendant."

The principle that personal jurisdiction of the defendant is required to affect the financial incidents of a marital relationship was reinforced by this Court in the case of Vanderbilt v. Vanderbilt, supra. In that case, the husband sued in

Nevada for a divorce and the wife was not served with process in Nevada and did not appear. A Nevada decree divorced the parties and released the parties from all marital duties and obligations to each other, that is, in effect the decree forever barred the wife from seeking alimony or a share of the marital property. The wife then started suit in New York for divorce, seeking alimony. The New York Court gave full faith and credit to the Nevada decree insofar as it granted a divorce but refused to give recognition to that part of the Nevada decree which purported to affect the wife's right or support which she now sought in the New York divorce action. This Court held that the Nevada decree to the extent that it purported to affect the wife's right of support was void and held:

> "In Estin v. Estin, 334 U.S. 541, 92L Ed. 1561, 58 S.Ct. 1213, 1 ALR2d 1412, this Court decided that a Nevada divorce court, which had no personal jurisdiction over

> the wife, had no power to terminate a husband's obligationto provide her support as required in a pre-existing New York separation decree. The factor which distinguishes the present case from Estin is that here the wife's right to support had not been reduced to judgment prior to the husband's ex parte divorce. In our opinion this difference is not material on the question before us. Since the wife was not subject to its jurisdiction, the Nevada court had no power to extinguish any right which she had under the law of New York to financial support from her husband. It has long been the constitutional rule that a court cannot adjudicate a personal claim or obligation unless it has jurisdiction over the person of the defendant. [citing Pennoyer v. Neff, 95 U.S. 714 (1878)] Here, the Nevada divorce court was as powerless to cut off the wife's support right as it would have been to order the husband to pay alimony if the wife had brought the divorce action and he had not been subject to the divorce court's jurisdiction. Therefore, the Nevada decree, to the extent it purported to affect the wife's right to support was void and the Full Faith and Credit Clause did not obligate New York to give it recognition. [citing concurring opinion in Armstrong v. Armstrong, 350 U.S. 568 (1955)] and the authorities collected therein as setting forth in greater detail the reasons underlying the Court's holding in this case.]
>
> (354 U.S., at 418-419)

This Court in Vanderbilt made reference that its decision therein was based upon the concurring opinion in the Armstrong

case and the authorities cited therein.[2]

The Armstrong case involved the following situation:

A husband sued his wife for divorce in Florida, which was the matrimonial domicile prior to the wife establishing domicile in Ohio; the wife was served by publication in Ohio and it was claimed and not challenged that she had actual knowledge of the Florida divorce action, but did not appear. Florida granted a divorce to the husband and made no alimony award to the wife; wife then sued for divorce in Ohio wherein the husband appeared specially to argue that Ohio should give full faith and credit to the Florida decree in both its determination of divorce and denial of alimony to the wife.

In an opinion by Mr. Justice Minton, five members of the Supreme Court construed the Florida decree as refusing to pass on

---

2. Vanderbilt v. Vanderbilt, 354 US 416, 419, no. 7

the question of the wife's alimony, rather than denying the wife's right to alimony. Consequently, they held that the Ohio courts did not, in fact, fail to give full faith and credit to Florida. The concurring opinion by Mr. Justice Black, joined in by Mr. Chief Justice Warren, Mr. Justice Douglas and Mr. Justice Clark, was based on the ground that a personal judgment denying alimony to a nonresident wife in divorce proceedings in which jurisdiction is obtained solely upon constructive service is invalid as a matter of due process and, consequently, not entitled to full faith and credit. It is this concurring opinion which became the law in this Court's holding in Vanderbilt.[3]

The concurring opinion in Armstrong gave its reasoning as follows:

> "We therefore reach the constitutional question whether the Ohio court was

---

3. See n. 2, supra.

> justified in denying full faith and credit to Florida decree. We believe that Ohio was not compelled to give full faith and credit to the Florida decree denying alimony to Mrs. Armstrong. Our view is based on the absence of power in the Florida court to render a personal judgment against Mrs. Armstrong depriving her of all right to alimony although she was a nonresident of Florida, had not been personally served with process in that State and had not appeared as a party. It has been the constitutional rule in this country at least since Pennoyer v. Neff, 95 U.S. 714, 24 L ed 565, decided in 1878, that nonresidents cannot be subjected to personal judgments without such service or appearance. We held in Estin v. Estin, 334 U.S. 541, 92 L ed 1561, 68 S. Ct. 1213, 1 ALR2d 1412, that an alimony judgment was this kind of 'personal judgment'."
>
> (350 U.S., at 576)

There can be no doubt that the Estin and Vanderbilt holdings would be construed under present principles of law to be authorities that in personam aspects of the Nevada decree in both said cases not only would not be recognized in a sister state but would be considered as void in the rendering State of Nevada. In a most recent pronouncement in World-Wide Volkswagen Corporation etal v. Woodson, supra,

this Court stated:

> "The Due Process Clause of the Fourteenth Amendment limits the power of a state court to render a valid personal judgment against a nonresident defendant, Kulko v. Superior Court, 436 U.S. 84, 91, 56 L Ed 2d 132, 98 S.Ct. 1960 (1978). A judgment rendered in violation of due process is void in the rendering State and is not entitled to full faith and credit elsewhere. Pennoyer v. Neff, 95 U.S. 714, 732-733; 24 L.Ed 565 (1978)" (emphasis appellant) [444 U.S., at 291]

It is submitted that the principles of law in Estin, Armstrong and Vanderbilt applicable to requiring in personam jurisdiction over a person to affect alimony rights in a divorce action apply with the same force to the question of whether a court dividing marital property requires in personam jurisdiction over the parties. There is no valid reason to treat marital property rights any different from the treatment accorded to support and alimony rights. [4] All such rights are the financial incidents of a marriage relationship

4. See also, H. Clark, Domestic Relations pp 317-318 (1968)

distinctly severable from the marital status itself. The decision below clearly evidences the state court held that in order to constitutionally effectuate a marital property division that personal jurisdiction over the defendant is required. (Apdx. A-11, A-16-17-18).

In Estin, Armstrong and Vanderbilt, this Court was faced with considering the constitutionality of a divorce rendering state's adjudication of a nonresident non-appearing spouse's right to alimony where the spouse was served outside the forum by constructive service and wherein the spouse made no voluntary appearance in the action. This is the precise situation in this case except that herein the courts of New Hampshire have adjudicated Anna Williams' right to marital property instead of adjudicating her monetary alimony rights. Furthermore, the states of

Nevada [5] (the divorce rendering state in the Estin and Vanderbilt cases) and Florida [6] (the divorce rendering state in the Armstrong case) had divorce statutes

---

5. In Nevada, the comparable statute to New Hampshire RSA 458:5 for purposes of establishing a residence requirement for the commencement of a divorce action at the time of Estin and Vanderbilt was what is now Nevada Revised Statutes (N.R.S.) 125.020 which is set out in the Appendix at A-3. The comparable Nevada statute to RSA 458:9 was Nevada Compiled Laws Supplement 1931-1941 (N.C.L.) Sec. 8582; it is set out in the Appendix at A-5.

6. In Florida, the comparable statute to New Hampshire RSA 458:5 at the time of the Armstrong case was Florida Statutes Annotated (F.S.A.) Sec. 61.021 which is set out in the Appendix at p. A-8. In the "History and Source of Law" section describing the statute's derivation there is stated that Laws 1957, c. 57-44, Sec. 1 changed the residence requirement from ninety days to six months. The 1935 amendment which provided for the ninety days residency requirement which was still in force at the time of the facts in Armstrong is also set out in the statute's derivation.

The comparable Florida statute to RSA 458:9 was F.S.A. Sec. 48.01. F.S.A. 49.011 is set out in the Appendix at pp. A-9 . In the statute's "History and Source of Law" section, the statute's 1967 amendment renumbered the section from Sec. 48.01 to 49.011 and added the text of

(footnote continued on next page)

which are virtually nondistinguishable from New Hampshire RSA 458:5 and RSA 458:9.

In each case this Court held that it was a violation of due process to affect the nonresident nonappearing spouse's right to alimony although the state had the requisite jurisdictional power to divorce the parties. Since this Court determined that given the applicable state statutes and fact patterns, the state courts lacked the power to render personal judgments over the nonresident nonappearing spouse served outside the state by constructive service, this Court never reached the "minimum contacts" test of International Shoe v. Washington [7]. The reason for this is clear. The similar divorce statutes of Florida and Nevada render

---

(footnote continued from preceding page)

new subdivisions (10), (11) and (13). Thus, at the time of Armstrong the section was numbered 48.01 but it did contain subdivision (4) pertaining to service of process by publication in a divorce action.

7. 326 U.S.310 (1945) (Footnote cont. next page)

jurisdiction over the marital status only and do not render in personam jurisdiction to adjudicate the property rights of the nonresident spouse. Further, there was no state statute which even purported to exercise in personam jurisdiction over the nonresident's spouse.

Therefore, it is undeniable that this Court had before it the divorce statutes of Nevada and Florida, which are similar to New Hampshire RSA 458:5 and 458:9 in their intent to provide for residency requirements and a method of out of state service of the divorce process, but the Court found that a denial of due process did occur because no in personam jurisdiction was present over the nonresident nonappearing spouse in each of the three cases. The divorce statutes of Nevada and

---

(Footnote continued from preceding page)
It is to be noted that International Shoe v. Washington was decided three (3) years prior to Estin, ten (10) years prior to Armstrong and twelve (12) years prior to Vanderbilt.

Florida, which the Supreme Court held did constitutionally yield a valid divorce, were not grounds for imposing in personam jurisdiction over the nonresident spouse. If the divorce statutes of Nevada and Florida were grounds jurisdictionally to assert in personam jurisdiction over the nonresident spouse, it is submitted that this Court would then have proceeded to a discussion of International Shoe and its "minimum contacts" rationale, which, of course, this Court did not.

Estin, Armstrong and Vanderbilt are clear and unmistakable holdings to which the Supreme Court of New Hampshire was bound constitutionally to obey. There are no permissible distinctions between New Hampshire RSA 458:5 and 458:9 and the Nevada and Florida divorce statutes there applicable. If the divorce states of said states did not yield in personam jurisdiction in the three cited cases, New Hampshire's divorce statutes cannot yield in personam

jurisdiction in Williams. Any analysis of the existence of appellant's "minimum contacts" in New Hampshire is not warranted in light of the fact that there is no long arm statute in New Hampshire which even attempts to assert in personam jurisdiction over a nonresident in a divorce case. The Supreme Court of New Hampshire's reliance upon RSA 458:5 and RSA 458:9 to permit entry into the "minimum contacts" test of International Shoe is misplaced and unconstitutional.

It is to be noted that today both Nevada [8] and Florida [9] have long arm statutes specifically designed to pertain to the in personam aspects of divorce actions. It is submitted that the reason for the statutes' passage in each state is clearly due to this Court's holdings in Estin, Armstrong

---

8. Nevada Revised Statute Sec. 14.065, which is set out in the Appendix at A-7 and more particularly subdivision 2 (e). Sec. 14.065 was added by laws 1969, Chapter 845.

9. Florida Statutes Annotated Sec. 48.193 which is set out in the Appendix at A-9 and particularly subdivision (1)(e). (Footnote continued next page)

and Vanderbilt. For if the Nevada and Florida divorce statutes were sufficient to confer in personam jurisdiction over a nonresident spouse, then there would be no reasons to have inserted the divorce provisions in each state's long arm statute.

The New Hampshire Supreme Court was bound by this Court's holdings in Estin, Armstrong and Vanderbilt and this compels a conclusion that there is no in personam jurisdiction; and New Hampshire's statute RSA 458:5 and RSA 458:9, which are divorce related statutes, do not and cannot provide personal jurisdiction over appellant. Therefore, the judgment of the Supreme Court of New Hampshire is clearly erroneous and must be reversed.

[Footnote 9 continued from preceding page]
The statute became effective July 1, 1973.

III APPELLANT WAS NOT ACCORDED ADEQUATE AND DUE NOTICE OF THE RELIEF ACTUALLY RENDERED BY THE TRIAL COURT IN THE FORM OF A MARITAL PROPERTY DIVISION AND THUS THE PROCEDURAL DUE PROCESS REQUIREMENTS OF THE FOURTEENTH AMENDMENT HAVE NOT BEEN MET.

Assuming arguendo that New Hampshire has the requisite statutory standard needed to exercise in personam jurisdiction over ANNA WILLIAMS, a basic question arises as to whether, by the contents of the divorce libel (Apdx. A-68) the appellant was given adequate notice of the relief sought by the plaintiff in the form of a marital property division. The nature in which the appellee requested and received a division of marital property was simply by alleging the following in the "Wherefore" clause of his libel for divorce:

> "...(2) That the financial assets of the parties be restored to the status quo which existed upon the marriage." (Apdx A-69)

The libel did not specify any property, real or personal. No property of appellant was attached at any time prior to judgment.

The actual relief granted to the appellee, however, was far in excess of that which would even be reasonably anticipated by the appellant from a review of the libel as served. As set forth supra, at 5-6, the trial court did much more than return the assets of the parties to status quo at the time of the marriage. The Court divested appellant of property acquired after the marriage which was not within the scope of the relief sought by appellee. The in personam aspects of the divorce decree are thus void for failure to comply with the due notice requirements of the Due Process clause of the Fourteenth Amendment.

IV. THE NEW HAMPSHIRE COURT'S EXERCISE OF IN PERSONAM JURISDICTION UNDER RSA 458:5 AND 458:9 FAILED THE FEDERAL MINIMUM CONTACTS TEST OF INTERNATIONAL SHOE AND ITS PROGENY BY THE PREDICATION OF JURISDICTION ON THE PLAINTIFF'S AND NOT THE DEFENDANT'S CONTACTS WITH THE FORUM. THE COURT FURTHER MISAPPLIED THE FEDERAL "MINIMUM CONTACTS" ANALYSIS BY CONSIDERING CONTACTS WHICH DID NOT GIVE RISE TO THE CAUSE OF ACTION SUED UPON.

The Supreme Court of New Hampshire, in construing RSA 458:5 and 458:9 to act as an additional long arm statute granting in personam jurisdiction over the nonresident defendant-appellant, has exerted long arm power in a manner never before attempted by any other state or federal jurisdiction. The court below has determined its state's ability to exercise in personam jurisdiction over a nonresident defendant by statutory

requirements based solely upon consideration of the plaintiff's contacts with the forum. RSA 458:5, as construed in the instant case, bases long arm jurisdiction over a nonresident defendant upon the plaintiff's contacts with the forum state. The exercise of state long arm jurisdiction in this manner creates novel questions never previously presented to this Court.

This long arm statute combination calls into question the very relationship between the state's exercise of long arm in personam jurisdiction and the federal "minimum contacts" due process analysis of International Shoe v. Washington and its progeny. Is "minimum contacts" analysis to be considered as a completely separate and independent standard without regard to the method employed by the state to acquire long arm jurisdiction, or is the federal "minimum contacts" test to be employed as a review of the statute and the requirements relied upon by the state --an insurance that the state's exercise of in personam

jurisdiction and its reasons therefor afford the nonresident defendant his rights under the Due Process Clause of the Fourteenth Amendment? More simply, can a state's statute purporting to grant in personam jurisdiction over a nonresident defendant rely on contacts of anyone other than those of the nonresident defendant, and still comport with the federal requirement of "minimum contacts" between the nonresident defendant, the forum and litigation? Appellant submits the state statute cannot so rely and further submits that any state long arm statute which exercises long arm in personam jurisdiction based upon a plaintiff's contacts with the forum is inherently violative of the nonresident defendant's rights under the Fourteenth Amendment of the United States Constitution.

> ". . . Due Process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum he [the defendant] have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' Milliken v. Meyer, 311 U.S. 457. . . " (International Shoe v. Washington 326 US, at 316)

With the advent of International Shoe v. Washington, supra, inquiry into the state's jurisdiction over a nonresident defendant shifted, from whether the defendant was "present" in the forum to whether there were such contacts of the nonresident with the forum state as to make it reasonable to require him to defend the suit in the particular forum.

This Court stated in Shaffer v. Heitner, 433 U.S. 186 (1977) that:

> "Mechanical or quantitative evaluation of the defendant's activities in the forum could not resolve the question of reasonableness: ' Whether due process is satisfied must depend rather upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure. That clause does not contemplate that a state may make binding a judgment in personam against an individual or corporate defendant with which the state has no contacts, ties, or relations.' " Id., at 204, quoting International Shoe v. Washington, supra, at 319.

> "Thus, the relationship among the defendant, the forum, and the litigation, rather than the mutually exclusive sovereignty of the States on which the rules of Pennoyer rest, became the central concern of the inquiry into personal jurisdiction." Id., at 204.

The requirement is implicit, both in the doctrine expressed by International Shoe and its progeny and in the language of every state's long arm statute, with the sole exception of the judicially created construction given New Hampshire's RSA 458:5 and 458:9, that a state statute authorizing the exercise of in personam jurisdiction over the said nonresident defendant which contains an articulation of a requisite relationship between the nonresident defendant and that state, must exist.[10]

---

10. New Hampshire's professed long arm statute, RSA 510:4, is no exception (Apdx. A-3). The statutes of the below states have enacted long arm statutes which are substantially similar to New Hampshire's professed long arm statute, RSA 510:4, except that these statutes are also specifically designed to obtain jurisdiction over a nonresident in a divorce action so as to have the requisite jurisdiction over a nonresident for alimony and support purposes and for marital property divisions whereas New Hampshire's long arm statute never has contained such a provision.

(A) IDAHO- Code of Civ. Proc. § 5-514(e)
(B) ILLINOIS- Rev. Stats., ch 110, § 17(1)(e)
(C) KANSAS- Code Civ. Proc. § 60-308(b) (8)
(D) MAINE- 14 M.R.S.A. § 704-A (2) (G)
(E) MASSACHUSETTS- M.G.L.A. c. 223 A, § 3(g)
(F) NEW YORK-Civil Practice Law & Rules 302 (b)
(G) OKLAHOMA-Title 12, Okla. Stats. §1701.03 (a)(7)

(footnote continued on next page)

The state must by statute espouse those contacts it will consider sufficient to require the nonresident defendant to defend in the forum.[11] If the exercise of in

---

(footnote continued from preceding page.)
In Hall, Morse, Gallagher & Anderson v. Koch & Koch, 119 N.H. 639, 645,406 A.2d 962,965 (1979), the lower court previously held "It is the 'relationship among the defendant, the forum, and the litigation' that controls whether a State can assert jurisdiction over a nonresident. Shaffer v. Heitner, 433 U.S. [186] at 204...In evaluating that relationship, we examine this State's interests in providing a forum for the resolution of the dispute, Leeper v. Leeper, 114 N.H. at 296, 319 A.2d at 627, and a review of the nonresidents' 'forum-related activities as they relate to the specific cause of action' Forsythe v. Overmeyer, 576 F. 2d 779,782 (9th Cir.), cert. denied, 439 U.S. 864, 99 S.Ct. 183, 58 L.Ed.2d 114 (1978).

11. In Traynor, Is This Conflict Really Necessary? 37 Tex. L.Rev.657,658 (1959), there is stated: "Nevertheless there is net gain of jurisdiction available to states in the modern concept of due process that envisages not only minimum contacts as a primary basis of jurisdiction, but also fair notice and an opportunity to be heard as the primary test for valid service. Most states have not yet begun to exercise the jurisdiction. In part the fault lies with statutes that have not kept pace." (Emphasis appellant)

In Woodring v. Hall 438 P.2d 135,141(Kansas, 1968) in a case concerning the attempted use of Kansas' long arm statute over a nonresident, the court stated: "To subject an individual defendant to a judgment in personam if he not be present within the territory of the forum state, he must have the minimum contacts' enumerated in the statute and whether due process is satisfied depends upon the quality and nature of the activities of the defendant,

(footnote continued on next page.)

personam jurisdiction is authorized by a validly drafted state statute, inquiry must then be made whether said exercise of jurisdiction is fair, or consistent with the federal constitutional requirements of Due Process first stated in International Shoe, supra. World-Wide Volkswagen Corp. v. Woodson, 444 U.S., at 289-90 .

The decision of the court below impliedly rejects the necessity of a prerequisite state statute which enumerated the nonresident defedant's contacts it will deem sufficient to require the nonresident to defend in the forum. If further impliedly holds that the "minimum contacts" analysis of

---

(footnote continued from preceding page.)
which may be determined on a case by case basis."
(emphasis by appellant)

For further authority, this Court is respectfully referred to Restatement (Second) of Conflict of Law, §36, comment "g"; Pulson v. American Rolling Mill. Co., 170 F.2d 193, 194 (1st Cir. 1948): Elliott v. U.S.Steel Export Co., 186 F. Supp. 57, 58-9(D.C.E.D. Pa. 1960) State Tax Commission v. Cord 404 P.2d 422,423 (Nev. 1965): Mizner v.Mizner, 439 P.2d 679 (Nev. 1968); Elliot v.Cabeen, 224 F. Supp. 50, 52 (D.C. Co.); A.F. Briggs Co. v. Starrett Corp. 329 A.2d 177 (Me. 1974)

of International Shoe is a generalized test rather than a federal check upon the state's exercise of long arm jurisdiction via its prerequisite state statute, and that the "minimum contacts" test can be reached without a state statute so enumerating the nonresident's contacts.

As every other state's long arm statute enumerates the requisite contacts between the nonresident defendant and the forum, the question of whether the federal "minimum contacts" analysis is reached where the state statute which purports to grant in personam jurisdiction considers no contacts of the nonresident defendant with the forum has never been considered by this Court.

The court below exercised in personam jurisdiction over appellant ANNA WILLIAMS based not upon the traditional long arm statute RSA 510:4 but upon a combination of RSA 458:5 and 458:9, the statutes traditionally used to base jurisdiction over the marital status alone, the marital "res."

This usage resulted in the granting of in personam jurisdiction over the nonresident appellant based solely upon the contacts of the plaintiff-appellee with the forum state. Appellant strongly contends that a state's exercise of in personam jurisdiction through a state long arm statute which is not based upon the nonresident defendant's contacts with the forum is inherently violative of due process and cannot by its very nature, meet the "minimum contacts" test of International Shoe v. Washington.

In addition, this Court in developing the "minimum contacts" analysis, stated the following:

> ". . . to the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of that state. The exercise of that privilege may give rise to obligations, and, insofar as those obligations arise out of or are connected with the activities within the state, a procedure which requires the corporation to respond to a suit brought to enforce them can in most instances hardly be said to be undue.
>
> (emphasis appellant)
>
> [International Shoe v. Washington, supra, at 319]

Of critical importance to a "minimum contacts" determination which in fact "does not offend traditional notions of fair play and substantial justice," is examination of those contacts which actually give rise to the obligations sued upon. Appellant submits that the New Hampshire Supreme Court considered "contacts" which did not give rise to the cause of action, that is, divorce grounded in irreconciliable differences (Libel for Divorce, Apdx. A-68). Their consideration of unrelated contacts resulted in a decision differing markedly from that which would have been reached by this Court and state courts of other jurisdictions.

In its August 10, 1981 opinion (Apdx. A-11), the New Hampshire Supreme Court found minimum contacts to exist inter alia. because appellant owned some land within the State of New Hampshire, stating "that fact alone may arguably be sufficient basis upon which to predicate jurisdiction

to divide marital property. (Apdx. A-20) The New Hampshire Supreme Court cited In re Marriage of Breen 560 S.W.2d 358, 363 as supporting authority. In re Marriage of Breen, however, was an exercise of in rem jurisdiction over real property. The New Hampshire Supreme Court is affirming in personam jurisdiction in the instant case. Its use of Breen as support for the aforementioned proposition is incorrect. The aforementioned is further incorrect in that the proposition contains no examination of the nature and quality of the contacts.

The divorce cause of action did not arise out of a bank account, a parcel of land in New Hampshire, a camp appellant's children once attended or visits the nonresident nondomiciliary appellant made to the forum state. It arose instead out of an irretrievably broken marital relationship, created and subsequently domiciled in New York State. It was appellee who chose to abandon appellant and leave the matrimonial

domicile. From the date of separation in 1971 to the present, appellant continued to be domiciled in New York.

In Kulko v. California Superior Court, supra, this court stated:

> "The cause of action herein asserted arises, not from the defendant's commercial transactions in interstate commerce, but rather from his personal, domestic relations. . ."
>
> "Finally basic considerations of fairness point decisively in favor of appellant's State of domicile as the proper forum for adjudication, whatever the merits of appellant's underlying claim. It is appellant who has remained in the state of matrimonial domicile, where it is appellee who has moved across the continent [Cites omitted.] Appellant has at all times resided in New York State, and until the separation and appellee's move to California, his entire family as well."
>
> [436 U.S., at 97)

Examination of the contacts which actually give rise to the cause of action is needed to consistently adjudicate the federal Due Process requirement of fair play and substantial justice. This Court in Kulko and numerous state court statutes and decisions indicate that the location of the marital domicile is a pivotal contact

in the overall analysis.[12]

The uncontested facts are that the parties to this lawsuit were married in New York in 1969, that they established their matrimonial domicile in New York, that appellee left appellant in New York in 1971 and that appellant has continued her domicile and residence for voting and tax purposes in New York to the present. The New Hampshire Supreme Court instead considered contacts which did not give rise to the cause of action. The Court's failure to consider the contacts out of which the cause of action arose was a misapplication of the "minimum contacts" test which failure was a violation of appellant's Due Process rights under the Fourteenth Amendment.

12. Accord, Mizner v. Mizner, 439 P.2d 679 (Nevada 1968); Note, Extending Minimum Contacts to Alimony: Mizner v. Mizner, 20 Hastings Law Review 361, 375 (1968); Hines v. Clendenning 465 P.2d 460, 463 (Okla. 1970); In re Marriage of Rinderknecht, 367 N.E.2d 1128, 1134-35 (Ct. of Appeals, Indiana 1977); Fliter v. Fliter, 383 So.2d 1084 (Miss. 1980).

CONCLUSION

For the reasons set forth above, this Court should note probable jurisdiction of this appeal or, alternatively, treat this jurisdictional statement as a petition for a writ of certiorari and grant the petition.

DATED: November 27, 1981

Respectfully submitted,

ANTHONY N. DEL ROSSO ESQ.
Attorney for Appellant
146 Old Country Road
Mineola, New York 11501
(516) 747-0400

RONALD J. CHISENA ESQ.
Associate Counsel to
ANTHONY N. DEL ROSSO ESQ.
146 Old Country Road
Mineola, New York 11501
(516) 747-0400

APPENDIX

TABLE OF CONTENTS

CONSTITUTIONAL PROVISIONS

Amendment XIV, §1 of the
United States Constitution.....A-1

NEW HAMPSHIRE STATUTES

Revised Statutes Annotated (RSA)

RSA 458:4.....A-1

RSA 458:5.....A-1

RSA 458:6.....A-2

RSA 458:9.....A-2

RSA 510:4.....A-3

NEVADA STATUTES

Nevada Revised Statutes,

N.R.S. 125.020.....A-3

Nevada Compiled Laws Supplement (1931-41)

N.C.L. §8582.....A-5

Nevada Revised Statutes,

N.R.S. 14.065 (excerpts).....A-7

FLORIDA STATUTES

Florida Statutes Annotated

F.S.A. §61.021.....A-8

F.S.A. §49.011(excerpts).....A-9

F.S.A. §48.193(excerpts).....A-9

DOCUMENTS

Opinion of theSupreme Court of New Hampshire in William Williams v. Anna Williams rendered August 10, 1981.....A-11

Decree of Divorce entered May 16, 1980 in the Superior Court, County of Rockingham, State of New Hampshire in William Williams v. Anna Williams.....A-23
and made a part of said decree by the court are the following:

1) Plaintiff's (Appellee's) Proposed Decree.....A-24

2) Plaintiff's (Appellee's) Requests forFindings of Fact and Rulings of Law A-31

3) Plaintiff's (Appellee's) Request for Additional Findings of Fact.....A-40

Opinion of the Supreme Court of the State of New Hampshire Denying Appellant's Motion for Rehearing rendered September 2, 1981.....A-42

Appellant's Motion to Supreme Court of the State of New Hampshire for Rehearing of Court's Decision Dated August 10, 1981.....A-43

Notice of Appeal to the Supreme Court of the United States Filed September 16, 1981 in the Supreme Court of the State of New Hampshire.....A-66

Appellee's Libel for Divorce in the Superior Court, County of Rockingham, State of New Hampshire.....A-68

Order of the Honorable William J. Brennan, Jr., Associate Justice of the Supreme Court of the United States, dated September 16, 1981, Granting Temporary Stay of Mandate of the Supreme Court of New Hampshire.....A-70

Order of the Honorable William J. Brennan, Jr., Associate Justice of the Supreme Court of the United States, dated September 29, 1981, Granting Stay of Mandate of the Supreme Court of New Hampshire.....A-72

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

UNITED STATES CONSTITUTION

U.S. Constitution Amend. XIV § 1:

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law. . . . ."

NEW HAMPSHIRE STATUTES

Revised Statutes Annotated

RSA 458:4

458:4 Limitation. The jurisdiction of the court to grant divorce is limited to cases where there is jurisdiction over the parties and of the alleged cause as defined in the two succeeding sections.

Revised Statutes Annotated

RSA 458:5

458:5 Over Parties. Jurisdiction of the parties exists in the following cases only:

I. Where both parties were domiciled in the state when the action was commenced.

II. Where the plaintiff was so domiciled and the defendant was personally served with process within the state

III. Where the plaintiff was domiciled in the state for one year next preceding the time when the action was commenced.

IV. Where the domiciled plaintiff has filed a libel the non-domiciled defendant may have affirmative relief upon filing a cross libel.

Revised Statutes Annotated

RSA 458:6

458:6 Over Cause of Action. Jurisdiction of the cause for divorce exists when it wholly arose or accrued while the plaintiff was domiciled in the state, and not otherwise

Revised Statutes Annotated

RSA 458:9

458:9 Venue; Notice. All libels for divorce shall be brought in the county in which the parties, or one of them, live, and before the superior court; and the notice of

the pendency thereof shall be given to the libelee, personal or otherwise, as the court shall order.

Revised Statutes Annotated

RSA 510:4

510:4 Nonresident Defendant.

I. Jurisdiction. Any person, who is not an inhabitant of this state, and who in person or through an agent transacts any business within this state, commits a tortious act within this state, or has the ownership, use, or possession of any real or personal property situated in this state, submits himself, or his personal representative, to the jurisdiction of the courts of this state as to any cause of action arising from or growing out of the acts enumerated above.

NEVADA STATUTES

Nevada Revised Statutes

N.R.S. Section 125.020

125.020 Verified complaint; domicile, residence; jurisdiction of district court.

1. Divorce from the bonds of matrimony may be obtained for the causes provided in NRS 125.010, by complaint, under oath, to the district court of any county:

(a) In which the cause therefor shall have accrued; or

(b) In which the defendant shall reside or be found; or

(c) In which the plaintiff shall reside; or

(d) In which the parties last cohabited; or

(e) If plaintiff shall have resided 6 weeks in the state before suit be brought

2. Unless the cause of action shall have accrued within the county while plaintiff and defendant were actually domiciled therein, no court shall have jurisdiction to grant a divorce unless either the plaintiff or defendant shall have been resident of the state for a period of not less than 6 weeks preceding the commencement of the action.

[Part 22:33:1861: A 1875, 63; 1913,

10; 1913, 159;1915, 26; 1921, 2;1921, 385; 1923, 389; 1927, 126; 1931, 1931 NCL §9400]

Nevada Compiled Laws Supplement 1931-1941

N.C.L. Section 8582

§8582 SUMMONS BY PUBLICATION - TO APPLY TO ALL CIVIL ACTIONS. §84. When the person on whom service is to be made resides out of the state or has departed from the state, or cannot, after due diligence, be found within the state, or conceals himself to avoid the service of summons, and the fact shall appear, by affidavit, to the satisfaction of the court or judge thereof, and it shall appear, either by affidavit or by a verified complaint on file, that a cause of action exists against the defendant in respect to whom the service is to be made, and that he is a necessary or proper party to the action, such court or judge may grant an order that the service be made by the publication of the summons.

Provided. When said affidavit is based on the fact that the party on whom service is

to be made resides out of the state, and the present address of the party is unknown, it shall be a sufficient showing of such fact if the affiant shall state generally in such affidavit that at a previous time such person resided out of this state in a certain place (naming the place and stating the latest date known to affiant when such party so resided there); that such place is the last place in which such party resided to the knowledge of affiant; that such party no longer resides at such place; that affiant does not know the present place of residence of such party or where such party can be found; and that affiant does not know and has never been informed and has no reason to believe that such party now resides in this state; and, in such case, it shall be presumed that such party still resides and remains out of the state, and such affidavit shall be deemed to be a sufficient showing of due diligence to find the defendant. This section shall

apply to all manner of civil actions, including those for divorce. As amended, Stats. 1923, 275; 1933, 174.

Nevada Revised Statutes

N.R.S. Section 14.065 (excerpts)

14.065 Personal service of process on party outside state.

1. Personal service of summons upon a party outside this state is sufficient to confer upon a court of this state jurisdiction of the person of the party so served if:

(a) Such service is made by delivering a copy of the summons, together with a copy of the complaint, to the party served in the manner provided by statute or rule of court for service upon a person of like kind within this state; and

(b) Such party has submitted himself to the jurisdiction of the courts of this state in a manner provided by this section.

2. Any person who, in person or through an agent or instrumentality, does

any of the acts enumerated in this subsection thereby submits himself and, if an individual, his personal representative to the jurisdiction of the courts of this state as to any cause of action which arises from the doing of such acts:

. . .

(e) Living in the marital relationship within this state notwithstanding subsequent departure from this state, as to all obligations arising for alimony, child support or property settlement, if the other party to the marital relationship continues to reside in this state.

. . .

FLORIDA STATUTES

Florida Statutes Annotated

F.S.A. §61.021

61.021 Residence required

To obtain a divorce plaintiff must reside six months in the state before filing the complaint, but this does not affect any suit for divorce filed before

October 1, 1957.

Florida Statutes Annotated

F.S.A.§49.011 (excerpts)

§49.011 Service of process by publication; in what cases

Service of process by publication may be made in any court on any person mentioned in §49.021, in any action or proceeding:

. . .

(4) For divorce or annulment of marriage:

. . .

Florida Statutes Annotated

F.S.A. 48.193 (excerpts)

48.193 Acts subjecting persons to jurisdiction of courts of state.

(1) Any person, whether or not a citizen or resident of this state, who personally or through an agent does any of the acts enumerated in this subsection thereby submits that person, if he is a natural person, his personal representative to the jurisdiction of the courts of this

state for any cause of action arising from the doing of any of the following:

. . .

(e) With respect to proceedings for alimony, child support, or division of property in connection with an action to dissolve a marriage or with respect to an independent action for support of dependents, maintains a matrimonial domicile in this state at the time of the commencement of this action, or if the defendant resided in this state preceding the commencement of the action, whether cohabiting during that time or not. This paragraph does not change the residency requirement for filing an action for dissolution of marriage.

. . .

A-11

OPINION OF

THE SUPREME COURT OF NEW HAMPSHIRE

Rockingham

No. 80-260

Original

No. 80-411

WILLIAM WILLIAMS

v.

ANNA WILLIAMS

August 10, 1981

Stephen R. Fine & Associates P.A., of Manchester (Marshall D. Hickok on the brief and orally) for the plaintiff.

Robert V. Johnson, II, of Concord (Robert V. Johnson Sr. on the brief and orally), and Anthony N. Del Rosso, of Mineola, New York (Mr. Del Rosso & a. on the brief and Ronald J. Chisena orally), for defendant.

DOUGLAS, J. The issue in this case is whether the superior court had in personam jurisdiction over the nonresident defendant who did not appear in an action for divorce

and distribution of marital property. We hold that it did.

The plaintiff, William Williams, is a domiciliary of New Hampshire. The defendant, Anna Williams, is a domiciliary of New York. The parties were married on February 14, 1969, in Mineola, New York. During the first two years of the marriage, the plaintiff, a Merchant Marines sea captain, spent eleven months each year at sea. In 1971, the parties built a house in New Castle, New Hampshire. The plaintiff moved to the house in New Castle; the defendant remained in New York. Throughout the next eight years, the parties visited each other on occasion.

On October 4, 1979, the plaintiff filed in the Rockingham County Superior Court a libel for divorce on the grounds of irreconcilable differences. Twenty-five days later, the defendant brought a separate action for divorce in New York.

The Rockingham County court twice issued orders of notice of the plaintiff's divorce libel, and twice the orders and copies of the libel were sent to the sheriff of Suffolk County, New York, to perfect service on the defendant. On each occasion, the sheriff was unable to serve the defendant. The plaintiff then moved for service by publication, and the court granted the motion. The order of notice and citation were published in a newspaper with a general circulation on Long Island on February 22, February 29, March 7, 1980. In addition, the superior court sent a copy of the libel to the defendant by certified mail. The defendant received that copy of the libel on February 20, 1980.

Because the original hearing date on the divorce was scheduled less than thirty days after the return date of the orders of notice by publication, the Master (Linda S. Dalianis, Esq.) rescheduled the hearing for thirty days after the return

date, see Superior Court Rule 152, and ordered a notice of hearing sent to the defendant. A hearing was held on May 14, 1980, and the defendant failed to appear.

The master recommended a decree of divorce of the parties in accordance with the proposed decree submitted by the plaintiff. That decree awarded to the plaintiff the house and land in New Castle, including the furniture and fixtures; a 1965 MGB automobile; all stocks and securities in the plaintiff's possession (except for 101 shares of Occidental Petroleum) the dividends and profits from those stocks and securities were awarded to him; and the parties' savings account and certificate of deposit at the Piscataqua Savings Bank, a New Hampshire bank. In turn, the defendant was awarded all the personal property in her possession, all the real property in her name alone, and the shares, with dividends and profits, of Occidental Petroleum. On May 16, 1980,

the Superior Court (Mullavey, J.) approved the master's recommendation.

On June 13, 1980, the defendant appeared specially and filed a motion to stay and set aside the decree of divorce based on lack of in personam jurisdiction over the defendant. A hearing on the motion was held on July 25, 1980, before the Master (Linda S. Dalianis, Esq.) The master recommended that the motion be denied, and on September 22, 1980, the Superior Court (Wyman, J.) decreed accordingly. By a notice of appeal filed June 13, 1980, and a petition for writ of certiorari filed in this court on October 20, 1980, the defendant challenges the superior court decrees.

The dispute in this case is not over the decree of divorce itself but over "the point where in the modern divorce action the contest nearly always occurs, over money." H. Clark, The Law of Domestic Relations in the United States

§11.4, at 316-17 (1968). The defendant seeks a "divisible" divorce by agreeing to the termination of the marriage status but challenging the court's decree dividing the parties' property. The defendant alleges that the property aspect of the decree is void because the court did not have in personam jurisdiction over her.

Traditionally, a State court had no jurisdiction to render a personal judgment against a nonresident defendant unless he was brought within the court's jurisdiction by service of process within the State, or he appeared voluntarily. Pennoyer v. Neff, 95 U.S. 714, 733 (1877); State v. Luv Pharmacy, Inc., 118 N.H. 398, 403, 388 A.2d 190, 193 (1978); see Duncan v. McDonough, 105 N.H. 308, 309-10, 199 A.2d 104, 105-06 (1964). Gradually, however, the rule expanded to allow in personam jurisdiction over a nonresident defendant who has "certain minimum contacts with...

[the forum State] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" (Citations omitted.) International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945). State v. Luv Pharmacy, Inc., supra at 403, 388 A.2d at 193. But, "[i]n the absence of personal service within this State, [in personam] jurisdiction over a non-resident can only be obtained if the legislature has provided another method of service of process." (Citations omitted.) Hutchins v. Del Rosso, 116 N.H. 421, 423, 365 A.2d 127, 129 (1976).

The defendant argues that New Hampshire has no statute that provides for in personam jurisdiction over non-resident defendants in divorce proceedings. We disagree. In Duford v. Duford, 119 N.H. 515, 516, 403 A.2d 431, 432 (1979), this court held that RSA 458:5 provides in personam jurisdiction when service is made in accordance with RSA 458:9.

RSA 458:5 provides in pertinent part: "[j]urisdiction of the parties exists in the following cases only:....III. Where the plaintiff was domiciled in the state for one year next preceding the time when the action was commenced..." The plaintiff is a life-long domiciliary of the State and thus meets the requirements of RSA 458:5 III. RSA 458:9 provides for notice to the defendant "as the court shall order." Initially, the court ordered personal service upon the defendant, but when she could not be found the court ordered notice by publication. Additionally, the court sent a copy of the libel to the defendant by certified mail. Because the plaintiff met the domicile requirements of RSA 458:5 III and the defendant was served according to RSA 458:9, the court had in personam jurisdiction over the defendant. Duford v. Duford, supra at 516, 403 A.2d at 432.

Having found that the superior court had in personam jurisdiction over the

defendant under New Hampshire law, we must determine whether the court had jurisdiction under federal law. Duford v. Duford, supra. at 516, 403 A.2d at 432. Minimum contacts with the forum State is the primary basis for jurisdiction under the due process clause of the fourteenth amendment. See Shaffer v. Heitner, 433 U.S. 186, 212 (1977) (quasi in rem jurisdiction); International Shoe Co. v. Washington, 326 U.S. at 316 (in personam jurisdiction); Traynor, "Is this Conflict Really Necessary?," 37 Tex. L.Rev. 657, 657-58 (1959). If the defendant does not have the requisite minimum contact with the forum State, then that State is barred by the fourteenth amendment from exercising the jurisdiction conferred by State statute. Kulko v. California Superior Court, 436 U.S. 84, 92 (1978).

Our inquiry is "whether the 'quality and nature' of the defendant's activity is such that it is 'reasonable' and 'fair' to require....[her] to conduct...[her]

defense in...[this] State." Kulko v. California Superior Court, supra. (quoting International Shoe Co. v. Washington, supra. at 316-17, 319). In this case, the defendant owned jointly with her husband real estate in this State. While that fact alone may arguably be a sufficient basis upon which to predicate jurisdiction to divide marital property, In re Marriage of Breen, 560 S.W.2d 358, 363 (Mo.App. 1977); see Shaffer v. Heitner, supra. at 207-08, the defendant had other contacts with this State. In addition to the real property, she jointly owned personal property in the form of a bank account and a certificate of deposit. She sent her children to school and to summer camp here, and, most important, she spent several months of every year for eight years with her husband in New Castle. In view of the fact that the defendant had substantial and regular contacts with this State, we conclude the superior court's exercise of jurisdiction

over her does not offend "'traditional notions of fair play and substantial justice.'" International Shoe Co. v. Washington, 326 U.S. at 316.

In addition to minimum contacts, jurisdiction over a defendant also depends upon reasonable notice that an action is pending. Kulko v. California Superior Court, 436 U.S. at 91; State v. Luv Pharmacy, Inc., 118 N.H. at 403, 388 A.2d at 193; see F. James, Civil Procedure §12.3 at 623 (1965). Fair notice and an opportunity to be heard are the primary tests for valid service upon a defendant. See Traynor, "Is this Conflict Really Necessary?," 36 Tex.L.Rev. 657, 658 (1959). In this case, the defendant received actual notice of the divorce libel by certified mail, which satisfies the notice requirement. See International Shoe Co. v. Washington, 326 U.S. at 320. She also received a fair opportunity to appear and be heard; the superior court

twice scheduled the hearing on the libel and sent notice to the defendant. At the hearing on the motion to set aside the decree, the defendant testified that she was aware of the New Hampshire action, but upon the advice of New York counsel, chose not to appear. Thus, the record clearly shows that the defendant received notice and had ample opportunity to appear and be heard had she chosen to do so. Jurisdiction over a nonresident defendant who has had minimum contacts with the State and actual notice of suit cannot be defeated by that defendant's tactical decision not to appear.

Affirmed.

BATCHELDER, J., did not sit; the others concurred.

DECREE OF DIVORCE ENTERED MAY 16, 1980

THE STATE OF NEW HAMPSHIRE

Rockingham, SS Superior Court

No. E-1771-79 April Term 1980

William Williams v. Anna Williams

Master recommends that the following decree be entered:

Divorce decreed for the cause of irreconciliable differences which have caused the irremediable breakdown of the marriage. The defendant failed to appear

1) Decree in accordance with Plaintiff's proposed decree.

2) Plaintiff's requests for Findings and Rulings nos. 1-39 and A-H are granted.

3) Plaintiff's requests for additional Findings of Fact nos. 1-3 are granted.

WILLIAMS VS WILLIAMS

EXHIBIT A

May 14, 1980 s/ Linda S. Dalianis
Master

Master's recommendation approved.

Order in accordance therewith.

s/ Wayne J. Mullavey
Presiding Justice

Judgment Day: May 16, 1980

THE STATE OF NEW HAMPSHIRE

Rockingham, SS. April Term 1980

April 22, 1980

SUPERIOR COURT

WILLIAM WILLIAMS

VS

ANNA WILLIAMS

PROPOSED DECREE

NOW COMES William Williams, plaintiff in the above entitled action for divorce, and proposes the following decree:

1. An absolute decree of divorce is granted to the plaintiff, William Williams on the grounds of irreconciliable differences which have caused the irremediable breakdown of the marriage.

2. That the land and buildings situated at Beach Hill Road, New Castle, New Hampshire, is hereby awarded to the plaintiff disencumbered of all right, title and interest of the defendant, and the defendant is ordered to deliver to the plaintiff a quit claim deed conveying her interest in such

property to the plaintiff within thirty (30) days of the effective date of this decree, and in the event of her failure to do so, this decree shall act as a conveyance of her interest in and to said real estate to the plaintiff.

3. That the household furniture and furnishings of the parties located at the family abode at Beach Hill Road, New Castle, New Hampshire is awarded to plaintiff.

4. That the personal property in the possession of the defendant is awarded to her.

5. That the 1965 MGB automobile is awarded to the plaintiff and the defendant is ordered to convey her interest in such automobile to the plaintiff not later than thirty (30) days after the effective date of the decree, and in the event of her failure to do so, this decree shall act as a transfer of her interest in and to said automobile to the plaintiff.

6. That the stop-transfer orders which

the defendant has caused to be placed upon stocks and securities is to be caused to be removed by the defendant. If such stop-transfer orders are not removed within thirty (30) days of the effective date of this decree, such stop-transfer orders shall be deemed null and void.

7. That all stocks and securities currently standing in the name of the plaintiff and defendant, (see Appendix A) with the exception of 101 shares of Occidental Petroleum, shall be transferred by the defendant to the plaintiff within thirty (30) days of the effective date of this decree, and in the event of her failure to do so, this decree shall act as a trsnfer of her interest in and to such stocks and securities to the plaintiff. Upon the defendant's compliance with this term, plaintiff shall transfer his interest in the Occidental Petroleum to the defendant.

8. All dividends and profits to which the parties are entitled from their ownership

in the stocks and securities, including those which have accrued during the pendency of the stop-transfer orders is awarded to the plaintiff, with the exception of the dividends and profits which have accrued with respect to the Occidental Petroleum, which are awarded to the defendant.

9. That no alimony is awarded to the defendant.

10. That the money presently in a savings account in the Piscataqua Bank in the amount of Ten Thousand ($10,000) Dollars is awarded to your plaintiff disencumbered of any right,title and interest on the part of the defendant.

11. That a certificate of deposit at the Piscataqua Savings Bank in the amount of Fourteen Thousand ($14,000) Dollars is awarded to your plaintiff disencumbered of any right, title, or interest on the part of the defendant.

12. That no order is made with respect to insurance.

13. That all real property in the sole name of your defendant is awarded her, disencumbered of any right, title, or interest on the part of the plaintiff.

Dated: 4/27/80

Respectfully submitted

William Williams

By his attorney

Stephen R. Fine

By s/ Stephen R. Fine

Appendix A

LISTS OF STOCKS OWNED JOINTLY

BY WILLIAM & ANNA WILLIAMS

Common	9/14/79) MARKET VALUE
102 Shares Allied Chemical	$ 3,876
1234 American Tel. & Tel.	$69,104
1 American Tel. & Tel. Bond	$ 775
1400 Bank of New York	$56,000
300 Chemical N.Y. Corp.	$12,600
904 Citicorp	$20,800
1682 Consolidated Edison	$38,700
808 Exxon (Standard Oil, NJ)	$45,248
200 General Motors	$12,500
1107 Gulf & Western	$47,700
100 Gulf Oil	$ 3,300
300 Lear Seigler	$ 6,600
100 International Business Machines	$ 6,600
728 J. P. Morgan & Co.	$36,500
596 Manufacturers Hanover	$21,456
640 Mobil Oil Corp.	$28,800
101 Occidental Petroleum	$ 2,525
200 Ogden Corp.	$ 6,500

100 Public Service of NH	$ 1,800
100 Texaco Oil	$ 2,900
500 Texas Gulf Corp.	$14,000
170 Toyota (Depositary Shares)	$ 6,800
60 Athena Corp.	$ 60
TOTAL	$415,084

LIST OF STOCKS OWNED BY WILLIAM WILLIAMS

100 American Tel. & Tel.	$ 5,000
100 General Motors	$ 6,250
100 Exxon	$ 5,600
TOTAL	$ 23,050

THE STATE OF NEW HAMPSHIRE

ROCKINGHAM, S.S. APRIL TERM 1980

April 22, 1980

SUPERIOR COURT

WILLIAM WILLIAMS

VS

ANNA WILLIAMS

PLAINTIFF'S REQUESTS FOR FINDINGS OF FACT AND RULINGS OF LAW

NOW COMES the plaintiff, William Williams, by and through his attorney, Stephen R. Fine and requests that this Honorable Court make the following Findings of Fact and Rulings of Law:

FINDINGS OF FACT

1. Irreconcilable differences have arisen between the parties which have caused the irremediable breakdown of the marriage.

2. That the Defendant at the time of the parties' marriage had assets in excess of One Million Dollars ($1,000,000.00).

3. That at the time of the marriage your Plaintiff was the sole owner of a certain

piece of real property located at Beach Hill Drive, Newcastle, New Hampshire for which real property your Plaintiff provided the entire purchase money.

4. That your Plaintiff provided the entire purchase money for a 1965 MGB sports-car.

5. That your Plaintiff provided the purchase money for the stocks and securities listed in Appendix A, with the exception of Occidental Petroleum.

6. That the above said MGB is currently in the possession of your Plaintiff.

7. That your Plaintiff currently resides at the property located at Beach Hill Road, Newcastle, New Hampshire, 02854.

8. That the stocks and securities listed in Appendix A are jointly held by the parties.

9. That the title to the said 1965 MGB is currently standing in the name of your Defendant.

10. That the title to the property

located at Beach Hill Drive in Newcastle, New Hampshire is currently jointly held by the parties with rights of survivorship.

11. That the above said stocks and securities are currently in the possession of your Plaintiff.

12. That the parties moved to New Hampshire in September of 1971.

13. That in 1971 the Defendant spent approximately four months physically present in the State of New Hampshire.

14. That in 1972 the defendant spent approximately six and one-half months physically present in the State of New Hampshire.

15. That in 1973 the Defendant spent approximately five and one-half months physically present in the State of New Hampshire.

16. That in 1974 the Defendant spent approximately two and one-half months physically present in the State of New Hampshire.

17. That in 1975 the Defendant spent approximately three months physically present in the State of New Hampshire.

18. That in 1976 the Defendant spent approximately two months physically present in the State of New Hampshire.

19. That in 1977 the Defendant spent approximately three and one-half months physically present in the State of New Hampshire.

20. That in 1978 the Defendant spent approximately three months physically present in the State of New Hampshire.

21. That in 1979 the Defendant spent approximately five days physically present in the State of New Hampshire.

22. That during the times above said, during which your Defendant was physically present in New Hampshire, she resided with your Plaintiff at their marital domicile.

23. That New Hampshire constitutes the location of the parties last marital domicile.

24. That the property located at Beach Hill Road, Newcastle, New Hampshire has a fair market value of $150,000.00.

25. That the 1965 MGB has a fair market

value of $4,000.00.

26. That the stocks and securities have a fair market value of approximately $350,000.00.

27. That during the entire marriage, only your Plaintiff provided the purchase money consideration for all improvements to the real property located at Beach Hill Road, Newcastle, New Hampshire.

28. That during the entire marriage, only your Plaintiff provided the purchase money consideration for the purchase of the above said stocks and securities.

29. That during the entire marriage it was mutually agreed that your Plaintiff should use the proceeds from the stocks and securities as abovesaid to prudently reinvest in other stocks and securities.

30. That your Plaintiff has used the proceeds from the stocks and securities to prudently invest in other stocks and securities.

31. That the Defendant is of independent

means, resources and wealth.

32. That the Defendant requires no support or alimony from the Plaintiff to maintain her standard of living.

33. That the conduct of the Defendant toward the Plaintiff has seriously affected his health and endangered his reason.

34. That your Defendant's then minor child, Robert Kulch, has attended St. Pauls School in Concord, New Hampshire during the school years 1969, 1970, 1971 and 1972.

35. That both of the Defendant's minor children have attended Camp Maris in Ossipee, New Hampshire for five successive summers during the years 1960-1965.

36. That your Defendant paid the consideration for her minor children to attend school and camp in New Hampshire.

37. That your Plaintiff was induced to transfer the stocks and securities into your Defendant's name to be held jointly by the parties by your Defendant's representation that she would transfer her solely held

assets into the parties names to be held jointly, which she did not do.

38. That your Plaintiff has a Passbook Savings Account at the Piscataqua Savings Bank in Portsmouth, New Hampshire in the amount of Ten Thousand Dollars ($10,000).

39. That your Plaintiff has a Certificate of Deposit in the amount of Fourteen Thousand Dollars ($14,000) at the Piscataqua Bank in Portsmouth, N.H.

RULINGS OF LAW

A. New Hampshire has wholly adopted the rationale of International Shoe Co. v Washington 326 U.S. 310 (1945), and its progeny, and our Supreme Court has determined that jurisdiction over non-residents will be exercised to the full constitutional limit. Leeper v. Leeper, 114 N.H. 294 at 296 (1974),

B. The word "any" in the phrase "transacts any business" in RSA 510:4 (Supp. 1979) demonstrates that the legislature

intended the statute to be construed in the broadest legal sense to encompass personal and private as well as commercial transactions. Leeper v. Leeper, 114 N.H. 294(1974); Ross v. Ross, N.E.2d 437 (1976)

C. Once jurisdiction has attached it exists for all times until the cause is fully and completely determined. Michigan Trust Co. v. Ferry, 228 U.S.346, 353 (1913). Barber v. Somers, 102 N.H. 38, 43 (1959).

D. As this Court has personal jurisdiction over the Defendant, this Court has the authority to order the Defendant to convey her interest in Plaintiff's real property to Plaintiff and if necessary, enforce its order by contempt proceedings. Whitauer v. Whitauer, 365 A.2d 1316, 1319(1976).

E. This Honorable Court has jurisdiction over the real property and under its broad equitable power it may award all real property located in New Hampshire in which the Defendant has any interest, to the Plaintiff, free and clear of all claims of

Defendant. Owen v. Stewart, 111 N.H. 350, 284 A2d. 492 (1971).

F. An individual interest in real property may be vested in the Plaintiff by the mere force of a divorce decree as effectively as the same could be done by a conveyance of the Defendant herself. Swett v. Swett, 49 N.H. 264 (1870).

G. The assignment of title to the parties real estate to the Plaintiff by the mere force of a divorce decree vests sole title in the Plaintiff as effectively as the same could be done by any conveyance of the Defendant herself. Whittier v. Whittier, 31 N.H. 452 (1855).

H. When the court has in personam jurisdiction over the Defendant in a divorce action, the Court has the authority to make an award which will effect the Defendant personally. Duford v. Duford, _____N.H. _____June 27, 1979

Respectfully submitted, William Williams by his attorney, Stephen R. Fine, 4/23/80

THE STATE OF NEW HAMPSHIRE

Rockingham, S.S. SUPERIOR COURT

E01771-79 April Term 1980

May 8, 1980

WILLIAM WILLIAMS

VS

ANNA WILLIAMS

PLAINTIFF'S REQUEST FOR ADDITIONAL FINDINGS OF FACT

NOW COMES the Plaintiff, William Williams, by and through his attorney, Stephen R. Fine and requests that the Honorable Court make the following findings of fact:

1. That during the parties' marriage the Defendant at all times expressly consented to the Plaintiff endorsing the Defendant's name upon the parties stock certificates and securities, which stocks and securities stood in the names of the parties jointly.

2. That during the parties' marriage, the Defendant at all times consented to

the Plaintiff signing the Defendant's name upon the parties stock certificate and securitites, which stock certificates and securities stood in the joint names of the parties, for the purpose of the Plaintiff redeeming such stocks and securities.

3. That the Plaintiff is a resident of the State of New Hampshire and has continously resided in New Hampshire since 1971.

Then personally appeared the above named William Williams and made oath that the above statements by him are true to the best of his knowledge and belief.,

Dated: Respectfully submitted

WILLIAM WILLIAMS

s/ Stephen R. Fine s/William Williams

Attorney for plaintiff

OPINION OF THE

SUPREME COURT OF THE

STATE OF NEW HAMPSHIRE

DENYING MOTION FOR REHEARING

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 80-260/80-411 William Williams v. Anna Williams, the court upon September 2, 1981 made the following order:

Motions for rehearing and reconsideration are denied. Mandate stayed for fifteen days pending appeal to Supreme Court.

Ralph H. Wood,

Clerk

APPELLANT'S MOTION TO SUPREME COURT OF NEW HAMPSHIRE FOR REHEARING OF SAID DECISION DATED AUGUST 10, 1981

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

1981 TERM APRIL SESSION

No. 80-260

and

No. 80-411

William Williams

v.

Anna Williams

On Appeal from the Superior Court of Rockingham County (80-260) and Petition for Writ of Certiorari (80-411)

MOTION FOR REHEARING OF THIS COURT'S DECISION DATED AUGUST 10, 1981 IN THE ABOVE MATTER PURSUANT

TO RULE 22 OF THE RULES OF
THE SUPREME COURT OF THE STATE
OF NEW HAMPSHIRE

TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF THE STATE OF NEW HAMPSHIRE:

NOW COMES Anna Williams of 12 Hamilton Place, Garden City, New York, 11530, the libelee and defendant-appellant in the above referenced proceeding, by her attorneys ANTHONY N. DEL ROSSO, ESQ., 146 Old Country Road, Mineola, New York 11501 and ROBERT JOHNSON, SR., ESQ. of the law offices of ROBERT JOHNSON II, 64 North State Street, Concord, New Hampshire 03301, of counsel, who hereby seek relief in the matter of a motion for rehearing of this Court's decision dated August 10, 1981 in the above matter and for which oral argument is requested, and rehearing is sought based upon the following:

POINT I

THE UNITED STATES SUPREME COURT DECISIONS IN VANDERBILT V. VANDERBILT, ARMSTRONG V. ARMSTRONG AND ESTIN V. ESTIN, ACT AS CONSTITUTIONAL BAR TO THIS COURT'S HOLDING IN WILLIAMS THAT NEW HAMPSHIRE HAS IN PERSONAM JURISDICTION OVER ANNA WILLIAMS, A NONRESIDENT NONAPPEARING SPOUSE, WHO WAS SERVED OUTSIDE THE FORUM IN ACCORDANCE WITH NEW HAMPSHIRE DIVORCE LAWS.

In each of the above cited cases[1] the U.S. Supreme Court was faced with considering the constitutionality of a divorce rendering state's adjudication of a nonresident, non-appearing spouse's right to alimony where the spouse was served outside the forum by substituted service and wherein the spouse made no voluntary appearance in the action. This is the precise situation in Williams except that in Williams the courts of New Hampshire have adjudicated Anna Williams' rights to marital property instead of adjudicating her monetary alimony rights.

---

[1] The facts of Estin v. Estin, 334 US 541 (1948) are provided on p.15 of appellant's brief. The facts of Armstrong v. Armstrong, 350 US 568 (1955) are provided on pp. 16-17 of the brief. The facts of Vanderbilt v. Vanderbilt, are provided on pp. 15-16 of the brief.

Furthermore, the states of Nevada[2] (the divorce rendering state in the Estin and Vanderbilt cases) and Florida[3] (the divorce rendering state in the Armstrong case)

---

[2] In Nevada, the comparable statute to New Hampshire RSA 458:5 for purposes of establishing a residency requirement for the commencement of a divorce action at the time of Estin and Vanderbilt was what is now Nevada Revised Statutes (N.R.S.) 125.020 which is set out in the Appendix to this Petition at p.1. The Comparable Nevada statute to RSA 458:9 was Nevada Compiled Laws Supplement 1931-1941 (N.C.L.) Sec. 8582; it is set out in the Appendix at p.2.

[3] In Florida, the comparable statute to New Hampshire PSA 458:5 at the time of the Armstrong case was Florida Statutes Annotated (F.S.A.) Sec. 61.021 which is set out in the Appendix at pp. 3-4. In the "History and Source of Law" section describing the statute's derivation there is stated that Laws 1957, c. 57-44, Sec. 1 changed the residency requirement from ninety days to six months. The 1935 amendment which provided for the ninety day residency requirement which was still in force at the time of the facts in Armstrong is also set out in the statute's derivation.

The comparable Florida statute to RSA 458:9 was F.S.A. Sec. 48.01. F.S.A. 49.011 is set out in the Appendix at pp. 5-6. In the statute's "History and Source of Law" section the statute's 1967 amendment renumbered the section from Sec. 48.01 to 49.011 and added the text of new subdivisions (10), (11) and (13). Thus, at the time of Armstrong the section was numbered 48.01 but it did contain subdivision (4) pertaining to service of process by publication in a divorce action.

had divorce statutes which are vitally undistinguishable from New Hampshire RSA 458:5 and RSA 458:9.

In each case the Court held that it was a violation of due process to affect the nonresident, nonappearing spouse's right to alimony although the state had the requisite jurisdictional power to divorce the parties. The reasoning of the Supreme Court in each of three cases can be summarized by the following passage from Mr. Justice Black's concurring opinion in Armstrong which opinion became the law in the Vanderbilt decision:

> "Our view is based on the absence of power in the Florida court to render a personal judgment against Mrs. Armstrong depriving her of all right to alimony although she was a nonresident of Florida, had not been personally served with process in that State and had not appeared as a party. It has been the constitutional rule in this country at least since Pennoyer v. Neff, 95 US 714, 24 L.ed. 565, decided in 1878, that nonresidents cannot be subjected to personal judgments without such service or appearance. We held in Estin v. Estin (citations omitted) that an alimony judgment was this kind of 'personal judgment'"[4]
>
> (350 US 568 at p. 576)

---

[4] Vanderbilt v. Vanderbilt, 354 U.S. 416, at p. 419 footnote 7.

Since the Supreme Court determined that given the applicable state statutes and fact patterns, the state courts lacked the power to render personal judgments over the nonresident, nonappearing spouse served outside the state by substituted service, the Supreme Court never reached the minimum contacts test of International Shoe Co. v. Washington.[5] The reason for this is clear. The similar divorce statutes of Florida and Nevada render jurisdiction over the marital status only and do not render in personam jurisdiction to adjudicate the property rights of the nonresident spouse. Further, there was no state statute which even purported to exercise in personam jurisdiction over the nonresident spouse.

---

[5] 326 U.S. 310 (1945). It is to be noted that International Shoe v. Washington was decided three (3) years prior to Estin, ten (10) years prior to Armstrong and twelve (12) years prior to Vanderbilt.

Therefore, it is undeniable that the U.S. Supreme Court had before it the divorce statutes of Nevada and Florida which are similar to New Hampshire RSA 458:5 and 458:9 in their intent to provide for residency requirements and a method of out of state service of the divorce process, but the Court found that a denial of due process did occur because no in personam jurisdiction was present over the non-resident, nonappearing spouse in each of the three cases. The divorce statutes of Nevada and Florida, which the Supreme Court held did constitutionally yield a valid divorce, were not grounds for imposing in personam jurisdiction over the non-resident spouse. If the divorce statutes of Nevada and Florida were grounds jurisdictionally to assert in personam jurisdiction over the nonresident spouse, it is submitted the U.S. Supreme Court would them have proceeded to a discussion

of International Shoe and its minimum contacts rationale, which, of course, the Court did not.

Estin, Armstrong and Vanderbilt are clear and unmistakable holdings to which this Court is bound constitutionally to obey. There are no permissible distinctions between New Hampshire RSA 458:5 and 458:9 and the Nevada and Florida divorce statutes there applicable. If the divorce statutes of Nevada and Florida did not yield in personam jurisdiction in the three cited cases, New Hampshire's divorce statutes cannot yield in personam jurisdiction in Williams. This Court's analysis of minimum contacts is not warranted in light of the fact that there is no longarm statute in New Hampshire which even attempts to assert in personam jurisdiction over a nonresident in a divorce case. This Court's reliance upon RSA 458:5 and RSA 458:9 to permit entry into the minimum contacts test of International Shoe is misplaced and unconstitutional.

It is to be noted that today both Nevada[6] and Florida[7] have longarm statutes specifically designed to pertain to divorce actions. It is submitted that the reason for the statutes' passage in each state is clearly due to the holdings in Estin, Armstrong and Vanderbilt. For if theNevada and Florida divorce statutes were sufficient to confer in personam jurisdiction over a nonresident spouse, then there would be no reasons to have inserted the divorce provision in each state's longarm statute.

---

[6] Nevada Revised Statutes Sec. 14.065, which is set out in the Appendix at pp. 7-8 and more particularly subdivision 2(e). Sec. 14.065 was added to laws 1969, Chapter 845.

[7] Florida Statutes Annotated Sec. 48.193, which is set out in the Appendix at pp. 9-10, and more particularly subdivision (1)(e). The statute became effective July 1, 1973.

This Court is bound by the U.S. Supreme Court holdings in Estin, Armstrong and Vanderbilt and this compels a conclusion that there can be no in personam jurisdiction in New Hampshire over Anna Williams, a non-resident, non-appearing spouse who was not served in New Hampshire. The Court's decision of August 10, 1981 must be amended accordingly.

POINT II

DUFORD V. DUFORD AND HUTCHINS V. DEL ROSSO ARE NOT AUTHORITY FOR THE HOLDING IN WILLIAMS V. WILLIAMS THAT IN PERSONAM JURISDICTION EXISTS UNDER RSA 458:5 AS SERVICE WAS MADE IN ACCORDANCE WITH RSA 458:9

This Court specifically found that defendant Duford was a domiciliary of New Hampshire and personal jurisdiction existed under RSA 458:5 by virtue of service made in accordance with 458:9. Appellant asserts that this Court is incorrect in its reasoning in Duford as to the grounds for existence of personal jurisdiction and RSA 458;5 and RSA 458:9 have been restricted by the New Hampshire Legislature by the clear terms

of RSA 458:4[8], which section this Court has failed to consider. If RSA 458:5 is applicable with RSA 458:6 then a court must consider this in the light of RSA 458:4 to conclude only that jurisdiction to affect the marital status alone has been obtained.

A finding of in personam jurisdiction in Duford was constitutional because this Court found New Hampshire to be defendant Michael Duford's domicile and that he had notice of the suit and had a fair opportunity to be heard and had sufficient contacts with New Hampshire. This Court was compelled to render a minimum contacts analysis to comply with the command of Shaffer v. Heitner, 433 U.S. 186.[9] The minimum contacts due

---

[8] RSA 458:4 provides: "Limitation. The jurisdiction of the court to grant divorce is limited to cases where there is jurisdiction over the parties and of the alleged cause of action as defined in the two succeeding sections." This is an obvious reference to RSA 458:5 and 458:6.

[9] In Shaffer the Court stated: "We hold that all assertions of state-court jurisdiction must be evaluated according to the standards set forth in International Shoe and its progeny." (433 U.S., p.212)

process analysis in Duford could not have been made to meet any test for the successful application of any longarm statutory assertion of in personam jurisdiction as defendant, Michael Duford, had already been found to be a domiciliary of New Hampshire. A longarm assertion of jurisdiction is clearly directed to nonresidents. The whereabouts of Michael Duford were not known but this does not mean that he was a nonresident of New Hampshire.

As stated in Kurland, "The Supreme Court, The Due Process Clause and The In Personam Jurisdiction of State Courts"

> "Domicile has served state courts as a constitutional base for asserting jurisdiction over absent defendants...[10] [citing Milliken v. Meyer, 311 U.S. 457 (1940)]

As domicile of defendant Michael Duford is the constitutional basis for the finding of in personam jurisdiction in

---

[10] 24 University of Chicago Law Review 569 at p. 575 (1958).

Duford, that case cannot be authority for the holding in this case that based upon Duford, in personam jurisdiction exists over Anna Williams, a nonresident. The missing factor in Williams of defendant Anna Williams' domicile in New Hampshire, which was present in Duford demands a conclusion that absent domicile of Anna Williams in New Hampshire, constitutionally there is no in personam jurisdiction over her.

This Court's citation to Hutchins v. Del Rosso, 116 N.H. 421, 365 A.2d 127, fails to give the full import of the teachings of that case.[11] The full quote from the case is as follows:

---

[11] At page 3 of the Williams opinion, this Court quoted only the first sentence of the quote in the text hereinabove.

> "In the absence of personal service within this State, jurisdiction over a non-resident can only be obtained if the legislature has provided another method of service of process. Restatement of Judgments §8 (b) 1942); see Rosenblum v. Company, 99 N.H. 267, 269, 109 A.2d 558, 561 (1954); F. James, Civil Procedure §12.2 (1965). The pertinent statutes at that time were RSA 510:4, :5, which provided for service on nonresidents in actions for recovery of real estate in this state if an attachment of real estate was made."
>
> (116 N.H. at p. 423; 365 A.2d at p. 129)

It is the second sentence of the above quote which evidences that the Hutchins court's reference to "another method of service of process" pertains to New Hampshire's long-arm statutes such as RSA 510:4 and not merely to a statute pertaining to a mode of service such as RSA 458:9 for which, it is submitted, this Court did utilize Hutchins v. Del Rosso as authority for.

POINT III

THIS COURT'S CONSTRUCTION OF RSA 458:5 AND RSA 458:9 AS LONGARM STATUTES IS VIOLATIVE OF DUR PROCESS AS SAID STATUTES ARE IMPERMISSIBLY VAGUE AND FAIL TO GIVE DUE NOTICE TO NON-RESIDENTS OF THEIR INTENT TO GIVE IN PERSONAM JURISDICTION OVER NON-RESIDENTS

In Mizner v. Mizner, 439 P.2d 679 (Sup. Ct.Nevada 1968), the Court construed California's longarm statute[12] to apply to divorce action holding:

> "Accordingly it is our opinion that in personam jurisdiction may be acquired over a nonresident defendant in a divorce action by extraterritorial personal service of process if (1) a statute of the support ordering state has authorized the acquisition of such jurisdiction in that manner, and (2) there exist sufficient contacts between the defendant the forum relevant to the cause of action to satisfy 'traditional notions of fair play and substantial justice.' The demands of due process are satisfied in these circumstances."
>
> (439 P.2d at p. 681)

In Traynor "Is This Conflict Really Necessary", 37 Tex.L.Rev. 657, 658 (1959), there is stated:

---

[12] The California provision controlling service of process in the Mizner action reads:

"Where jurisdiction is acquired over a person who is outside of this State by publication of summons in accordance with Sections 412 and 413, the court shall have the power to render a personal judgment against such person only if he was personally served with a copy of the summons and complaint, and was a resident of this State (a) at the time of the commencement of the action, or (b) at the time that the cause of action arose, or (c) at the time of service." Cal.Civ.Pro. Code Sec. 417 (West Supp. 1963); See also 1969 Utal L.Rev. 580, 583 n.17.

> "Nevertheless there is a net gain of jurisdiction available to states in the modern concept of due process that envisages not only minimum contacts as a primary basis of jurisdiction but also fair notice and an opportunity to be heard as the primary test for valid service. Most states have not yet begun to exercise the jurisdiction. In part the fault lies with statutes that have not kept pace." (emphasis appellant)

Appellant asserts that a state must by statute prescribe those activities of a nonresident which will subject that nonresident to in personam jurisdiction in the forum, and it is the minimum contacts of the nonresident with the forum that the statute must address itself to. A statute, such as RSA 458:9 which merely pertains to a method of service is grossly insufficient to meet this statutory standard. What language must the statute contain to so notify nonresidents of its intended scope?

In Woodring v. Hall[13] the Supreme Court of Kansas in a case concerning the attempted use of Kansas' longarm statute over a nonresident, stated:

---

13 Cited Leeper v. Leeper, 114 N.H. 294 at p. 297; see appellant's brief at pp. 38-39

> "To subject an individual defendant to a judgment in personam if he not be present within the territory of the forum state, he must have the 'minimum contacts' enumerated in the statute, and whether due process is satisfied depends upon the quality and nature of the activities of the defendant, which may be determined on a case by case basis."
>
> (438 P.2d at p. 141)

RSA 458:5 and more particularly 458:5 III upon which Williams is based and 458:9 are not addressed to any contacts, ties or relations of the defendant to the forum. The only contact that 458:5 III refers to is plaintiff's forum contact as a domiciliary. The defendant's forum contacts are not provided for. This is in marked contrast to RSA 510:4 which clearly on its face pertains to non-resident individuals and prescribed those forum related minimum contacts which will subject the nonresident to in personam jurisdiction, but only as to those acts specifically enumerated in the statute.

This Court has failed to consider the holding in Rosenblum v. Judson Engineering

Corp., 99 N.H. 267, 109 A.2d 558 (1954) which involved an attempt to ascertain in personam jurisdiction over a nonresident individual served outside New Hampshire under R.L. c.387, §§4-6, permitting service outside New Hampshire where service could not be effectuated in New Hampshire, at a time when present RSA 510:4 was not the law. The statute involved is similar in purpose to RSA 458:9 in a divorce case. The Court held:

> "Service upon a nonresident individual must be made in hand within this state in order to subject him to jurisdiction here, except in certain circumstances not applicable in this case. R.L. c. 387, §§4-6. A state may by appropriate legislation constitutionally require that a nonresident individual doing business in the state be subjected to its jurisdiction by some method of service other than by service in hand within the state, as to cause of action arising out of the business done there (citations omitted). This power has not been exercised by our legislature. Section 8 of R.L. c.387 relied on by the plaintiff, provides that the court may order 'such notice...as the case requires' when the defendant is a nonresident 'and no mode of serving the writ is prescribed, or service thereof cannot be made in the mode prescribed.' THIS STATUTE WAS ADOPTED IN 1852 AND CONTAINS NO REFERENCE TO JURISDICTIONAL MATTERS SUCH AS ACTS OR CONTACTS OF THE DEFENDANT IN THIS STATE.

> (citations omitted). IT WAS NOT INTENDED TO EXPRESS A LEGISLATIVE POLICY THAT NON-RESIDENTS ELECTING TO ENGAGE IN BUSINESS IN THIS STATE MUST BE PREPARED TO BE SUBJECT TO SUBSTITUTED SERVICE IN ANY ACTION BROUGHT HERE TO WHICH THE BUSINESS IN THIS STATE GIVES RISE."
>
> (99 N.H. at p. 270; emphasis appellant)

This court has thus clearly held that a statute such as RSA 458:9 which merely provides a manner of service cannot be considered to refer to legislative policy setting forth any jurisdictional matters such as the acts or contacts which the nonresident defendant must have with New Hampshire before a long-arm statute permitting service outside New Hampshire could be utilized.

This court held in its August 10, 1981 opinion that:

> "Because the plaintiff met the domicile requirements of RSA 458:5 III and the defendant was served according to RSA 458:9, the court had in personam jurisdiction over the defendant."

Therefore, as RSA 458:5 is impermissibly vague in that it fails to provide any notice whatsoever to a nonresident that any act or contact which he or she may have with

New Hampshire will cause in personam jurisdiction to exist, and as RSA 458:9 is merely a method of service statute and not a jurisdictional service statute, neither of said statutes or their combination will yield a construction that would not be violative of procedural due process.

POINT IV

THIS COURT HAS INCORRECTLY APPLIED THE "MINIMUM CONTACTS" TEST IN WILLIAMS V. WILLIAMS

While this court has found certain contacts of Anna Williams with New Hampshire to be substantial in nature, this factor alone is insufficient to meet the minimum contacts test of International Shoe v. Washington, supra., and its progeny:

> "Whether due process is satisfied must depend rather upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure. That clause does not contemplate that a state may make binding a judgment in personam against an individual or corporate defendant with which the state had no contacts, ties or relations...
>
> But to the extent that a corporation exercises the privilege of conducting

> activities within a state, it enjoys the benefits and protections of the laws of that state. The exercise of that privilege may give rise to obligations, and, so far as those obligations arise out of or are connected with the activities within the state, a procedure which requires the corporation to respond to a suit brought to enforce them, can, in most instances, hardly be said to be undue."
>
> (326 U.S. at p. 319)

Activities within the forum which do not actually give rise to the cause of action sued upon do not serve to meet the minimum contacts requirement of International Shoe. This is supported in the later cases of Shaffer v. Heitner, supra., and Kulko v. California Superior Court, 436 U.S. 84 (1978). In Shaffer, the Supreme Court stated:

> "Thus, although the presence of the defendant's property in a State might suggest the existence of other ties among the defendant, the State, and the litigation, the presence of the property alone would not support the State's jurisdiction. If those other ties did not exist, cases over which the State is now thought to have jurisdiction could not be brought in that forum."
>
> (433 U.S. at p. 209)

In Kulko, which was a domestic relations controversy involving a support agreement

modification, the Supreme Court stated:

> "The cause of action herein asserted arises, not from the defendant's commercial transactions in interstate commerce, but rather from his personal, domestic relations. (436 U.S. at p. 97)

In Hall, Morse, Gallagher & Anderson v. Koch & Koch, 119 N.H. 639, 406 A.2d 962 (1979), this Court states:

> "It is 'the relationship among the defendant, the forum, and the litigation' that controls whether a state can assert jurisdiction over a nonresident. Shaffer v. Heitner, 433 US at 204, 97 S.Ct. at 2580. In evaluating that relationship, we examine this State's interests in providing a forum for the resolution of the dispute, Leeper v. Leeper, 114 N.H. at 296, 319 A.2d at 627, and a review of the nonresidents' forum-related activities as they relate to specific cause of action.' Forsythe v. Overmeyer, 576 F.2d 779, 982 (9th Cir.), cert.denied, 439 U.S. 864, 99 S.Ct. 188, 58 L.Ed.2d, 114 (1978).
>
> (119 N.H. at p. 645; 406 A.2d at p. 965)
> (emphasis Appellant)

The contacts of Anna Williams related by this Court in the Williams opinion deal mainly with defendant's in rem contacts in New Hampshire, that is, concerning her

real and personal property in the state. Within the strictures of Shaffer and Kulko, such contacts do not relate to the cause of action for divorce, and thus the minimum contacts test has not been satisfied.

Respectfully submitted,

ANTHONY N. DEL ROSSO, ESQ.
Attorney for Anna Williams
146 Old Country Road
Mineola, NY 11501
(516) 747-0400

BY s/ Anthony N. Del Rosso
Anthony N. Del Rosso

BY s/ Ronald J. Chisena
Ronald J.Chisena

ROBERT V. JOHNSON SR. ESQ.,
Of Counsel
Office & P. O. Address
64 North State Street
Concord, NH 03301 (603) 224-6551

BY s/ Robert V. Johnson Sr.
Robert V. Johnson, Sr.

NOTICE OF APPEAL TO THE SUPREME COURT

OF THE UNITED STATES

FILED ON SEPTEMBER 16, 1981

IN THE SUPREME COURT OF THE

STATE OF NEW HAMPSHIRE

IN THE SUPREME COURT OF THE

STATE OF NEW HAMPSHIRE

ANNA WILLIAMS, APPELLANT	)	Rockingham No. 80-260
V.	)	
WILLIAM WILLIAMS, APPELLEE	)	Original No. 80-411

NOTICE OF APPEAL TO THE SUPREME COURT

OF THE UNITED STATES

Notice is hereby given that ANNA WILLIAMS, the Appellant above named, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of New Hampshire entered August 10, 1981, as amended by denial of petition for rehearing on September 2, 1981.

This appeal is taken pursuant to 28 U.S.C. §1257 (2).

DATED: September 15, 1981

/s/ Anthony N. Del Rosso
ANTHONY N. DEL ROSSO, ESQ.
146 Old Country Road
Mineola, New York 11501
(516) 747-0400
Counsel of Record for Appellant

LIBEL FOR DIVORCE IN THE SUPERIOR COURT

OF NEW HAMPSHIRE

THE STATE OF NEW HAMPSHIRE

ROCKINGHAM, SS SEPTEMBER TERM 1979

SUPERIOR COURT

William Williams

v.

Anna Williams

LIBEL FOR DIVORCE

NOW COMES William Williams of New Castle, County of Rockingham, and State of New Hampshire, and complains against Anna Williams of Foster Crossing, South Hampton, New York, and says:

1. That the Plaintiff was lawfully married to the Defendant on February 14, 1969 in Mineola, New York.

2. That the Plaintiff has continuously resided in New Hampshire since 1971.

3. That no children have been born of this marriage.

4. That the parties hereto entered into the marriage each owning substantial

assets.

5. That since the time of their marriage, the parties have been separated for most of the time.

6. That there have arisen as between the parties such irreconcilable differences as have caused the irremediable breakdown of their marriage.

WHEREFORE, the said William Williams prays:

1. That a divorce from the bonds of matrimony between himself and the said Anna Williams be decreed.

2. That the financial assets of the parties be restored to the status quo which existed prior to the marriage.

3. And for such other and further relief as may be just.

Respectfully submitted,

s/Stephen R. Fine
Attorney for William Williams

s/William Williams

ORDER OF THE HONORABLE
WILLIAM J. BRENNAN, JR.
ASSOCIATE JUSTICE OF THE SUPREME
COURT OF THE UNITED STATES
DATED SEPTEMBER 16, 1981, GRANTING
TEMPORARY STAY OF MANDATE OF
THE SUPREME COURT OF NEW HAMPSHIRE

SUPREME COURT OF THE UNITED STATES

No. A-229

ANNA WILLIAMS,

Appellant

v.

WILLIAM WILLIAMS

O R D E R

UPON CONSIDERATION of the application of counsel for the appellant,

IT IS ORDERED that the execution and enforcement of the mandate of the Supreme Court of New Hampshire, case Nos. 80-260

and 80-411, be, and the same is hereby, stayed pending receipt of a response and further order of the undersigned or of the Court.

/s/ William J. Brennan, Jr.
Associate Justice of the
Supreme Court of the United
States

Dated this Sixteenth
day of September, 1981.

ORDER OF THE HONORABLE
WILLIAM J. BRENNAN, JR.
ASSOCIATE JUSTICE OF THE SUPREME
COURT OF THE UNITED STATES
DATED SEPTEMBER 29, 1981, GRANTING
STAY OF MANDATE OF
THE SUPREME COURT OF NEW HAMPSHIRE

SUPREME COURT OF THE UNITED STATES

No. A-229

ANNA WILLIAMS,
Appellant

v.

WILLIAM WILLIAMS

O R D E R

UPON FURTHER CONSIDERATION of the application of counsel for the appellant and the response filed thereto,

IT IS ORDERED that the stay of mandate

of the Supreme Court of New Hampshire heretofore entered on September 16, 1981 be, and the same is hereby, continued pending the timely docketing of an appeal in the above-entitled cause. Should such an appeal be so timely docketed, this order is to continue pending this Court's action on the jurisdictional statement. If the appeal is dismissed or the judgment of the Supreme Court of New Hampshire is affirmed, this order is to terminate automatically. In the event that jurisdiction is noted or postponed, this order is to remain in effect pending the issuance of the mandate of this Court.

/s/ William J. Brennan, Jr.
Associate Justice of the
Supreme Court of the United
States

Dated this Twenty-Ninth
day of September, 1981.

Office - Supreme Court, U.S.
FILED
JAN 25 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1028

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

ANNA WILLIAMS,

Appellant,

—v.—

WILLIAM WILLIAMS,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF
THE STATE OF NEW HAMPSHIRE

MOTION TO DISMISS

BARRY M. SCOTCH, ESQ.
Counsel of Record
1000 Elm Street
Manchester, NH 03101
(603) 668-8100

MARSHALL D. HICKOK, ESQ.
Counsel for Appellee
65 West Merrimack Street
Manchester, NH 03101
(603) 627-3032

QUESTIONS PRESENTED

Can the State of New Hampshire, consistent with federal due process constraints, award a divorce to a domiciliary husband, and restore to him marital property which he brought to the marriage, or purchased, and which property is present in New Hampshire, if the non-resident, non-appearing spouse has "regular" and "substantial" contacts with the state, and does not contest receiving two (2) orders to appear, but tactical purposes elects to disregard the New Hampshire action and proceed in a subsequently commenced divorce in New York?

DECISION OF THE COURT BELOW

The opinion of the Supreme Court of the State of New Hampshire is reported in 433 A.2d 1316 (1981), and also appears in the appendix to appellant's Jurisdictional Statement at pages A-11 through A-22.

SUMMARY OF ARGUMENTS PRESENTED

I. Appellant failed to present her federal claim in a timely and proper fashion below. Where the record is silent on the claim which appellant now raises, the burden is upon her to demonstrate that she properly presented the claim to the lower courts. Since the appellant had ample opportunity to raise her federal claim, and since the court's construction of the statute of which she complains is not "novel," she cannot meet this burden and her appeal should therefore be dismissed.

II. Where this Court has concluded that "all assertions of state-court jurisdiction must be evaluated according to the standards set forth in International Shoe and its progeny" and that ". . . [t]o the extent that prior decisions are inconsistent with this standard, they are overruled,"

Shaffer v. Heitner, 433 U.S. 186 at 212(1977), (emphasis supplied) and where, in light of such standard the appellant was found to have had actual notice of the New Hampshire proceedings and "regular" and "substantial" contacts with New Hampshire arising out of the parties' marital relation in that State, the New Hampshire state courts did not violate federal due process standards in asserting jurisdiction in this case. Accordingly, no substantial federal issue is presented and appellant's appeal should therefore be dismissed and/or her Petition for Certiorari denied.

III. The decision below is fair, gave full consideration to the issues, and should be affirmed. Appellee is a seventy year old, life-long domiciliary of New Hampshire who had no significant contact with New York. Appellee shared his New Hampshire

property with the appellant, while she did not reciprocate with her New York and Florida property. Now, appellant, in a subsequently commenced New York divorce action, is seeking all of her solely held New York and Florida property and, in addition, seeks one-half of appellee's New Hampshire property. Appellant has "tied up" appellee's life savings by writing to banks and transfer agents and threatening them with suit for "actual and punitive" damages if they release proceeds to appellee. As a result, appellee has been relying on a seaman's pension to live, while in contrast, none of appellant's assets have been "tied up." New Hampshire is the proper forum to have heard this cause because the property at issue is present in New Hampshire and both parties had significant contacts here. The New Hampshire court awarded only

property to appellee in which he had sole equity. In view of the actions pending in New York against appellee, if the New Hampshire Supreme Court decision is not affirmed, further litigation and appeals will result, thereby further depriving the appellee of his property and depriving him of a forum in which to litigate his interest in his New Hampshire home.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
DECISION BELOW	i
SUMMARY OF ARGUMENTS	ii
CITATIONS	viii.
STATEMENT OF THE CASE	2
The Facts	2
Prior Proceedings	7
ARGUMENT	
I. The appeal should be dismissed for lack of jurisdiction because the federal claim now made was not presented in a timely and proper fashion in the courts below and has not been passed upon by the New Hampshire Supreme Court.	13
II. The appeal should be dismissed for failure to present a substantial federal issue.	28
A. New Hampshire's Enabling Authority . . .	28
B. Federal Constraints . . .	31
C. Appellant's Contacts with New Hampshire . . .	38
D. Notice to the Appellant .	43

TABLE OF CONTENTS
(continued)

PAGE

III. The decision below gave full consideration to the issues, decided them correctly and the result is fair. 47

CONCLUSION 51

APPENDIX A-1

CITATIONS

	PAGE
Aero Mayflower Transit Co. v. Board of Railroad Commissioners of Montana et al., 332 U.S. 495(1947)	29
Albertson v. Millard, 345 U.S. 242(1953)	29
Amalgamated Food Employees Union v. Logan Valley Plaza, 391 U.S. 308(1968)(dissent)	14
Armstrong v. Armstrong, 350 U.S. 568(1955)	34,35
Cardinale v. Louisiana, 394 U.S. 437(1969)	14
Cox Broadcasting Corp. v. Cohn, 420 U.S. 469(1975)	21
Duford v. Duford, 119 NH 515, 403 A.2d 431(1979)	18, 22-30
Estin v. Estin, 334 U.S. 541(1948) .	35
Ex Parte McCardle, 74 U.S. (7 Wall) 506, 19 L.Ed. 264(1869)	13
Ferguson v. Georgia, 365 U.S. 570(1961)	14
Great Northern Railway Co. v. Sunburst Oil and Refining Co., 287 U.S. 358(1932)	30
Guaranty Trust Co. v. Blodgett, 287 U.S. 509(1933)	30

CITATIONS
(continued)

	PAGE
Hanson v. Denckla, 357 U.S. 235(1958)	36, 38,41
Herndon v. Georgia, 295 U.S. 441(1935)	21,25
International Shoe Co. v. Washington, 326 U.S. 310(1945) . .	22,29, 32,33, 35-38, 42
In re Lamkin, 355 U.S. 59(1957) . . .	14
Kingsley Pictures Corp. v. Regents, 360 U.S. 684(1959)	29
Kulko v. California Superior Court, 436 U.S. 84(1978)	23,38
Leeper v. Leeper, 114 NH 294, 319 A.2d 626(1974)	29
McGee v. International Life Insurance Co., 355 U.S. 220(1957) . . .	36,37
Mroczynski v. McGrath, 34 Ill. 2d 451, 216 N.E. 2d.137(1966)	34
Nickas v. Nickas, 113 NH 261, 306 A.2d. 51(1973)	23,42
O'Hare International Bank v. Hampton, 437 F.2d. 1173 (7th Cir. 1971)	33,34
Pennoyer v. Neff, 95 U.S. 714(1877) .	32, 34-35

CITATIONS
(continued)

	PAGE
Shaffer v. Heitner, 433 U.S. 186 (1977)	22,37
Soule v. Soule, 193 Cal.A.2d. 433, 14 Cal. Rptr. 417(1961)	33
Stanley v. Stanley, 271 A.2d.636 (Me. 1970)	34
Street v. New York, 394 U.S. 576 (1969)	20
Travelers Health Association v. Virginia, 339 U.S. 643(1950) . . .	36,37
United States v. Burnison, 339 U.S. 87(1950)	31
Vanderbilt v. Vanderbilt, 354 U.S. 416(1957)	35

STATUTES

	PAGE
United States Statutes	
28 U.S.C. §1257(2)	13,14
New Hampshire Statutes	
RSA 458:5 III	1, 9,11, 12,15-20, 22,23,24, 26-31 Apdx. A-1

PAGE

New Hampshire Statutes (continued)

RSA 458:9 9,15,19
Apdx. A-1

RSA 510:4 19
Apdx. A-3

Court Rules

United States Supreme Court
Rule 15.1.g. 20

New Hampshire Supreme Court
Rule 16 . . . . . 16 n.11

New Hampshire Superior Court
Rule 146 9
Apdx. A-2

Law Review Articles

Note, Long-Arm Jurisdiction in Alimony and Custody Cases, 73 Col. L. Rev. 289 (1973) . 32,33

In The

Supreme Court of the United States

October Term, 1981

No.81-1028

ANNA WILLIAMS, Appellant

v.

WILLIAM WILLIAMS, Appellee

On appeal from the Supreme Court
of the State of New Hampshire

Appellee William William's
Motion to Dismiss

Appellee William Williams respectfully moves to dismiss on the grounds that the alleged invalidity of New Hampshire RSA 458:5 III was not timely and properly presented and was not passed upon by the New Hampshire Supreme Court.

Appellee further moves to dismiss on the grounds that the appeal does not present a substantial federal question.

STATEMENT OF THE CASE

The Facts

The following facts appear as a matter of record. Such facts exist as a matter of law, and were found by the trial court below. These facts were uncontested by the appellant, either by personal affadavit, or during the trial court's rehearing below. In addition, the following facts were affirmed by the New Hampshire Supreme Court upon appeal:

A. The appellant, Anna Williams, first moved to the parties' marital domicile in New Castle, New Hampshire, in September of 1971.

B. The appellant spent a cumulative period of two and one-half (2 1/2) years with the appellee over the last eight (8) years, while residing at the parties' marital domicile in New Castle, New Hampshire.

C. The parties lived together in New Hampshire as man and wife.

D. The appellant, Anna Williams, is of independent means, resources and wealth; that the appellant has assets in an amount far in excess of appellee's net worth, and that the appellant had assets at the time of the parties' marriage in excess of one million dollars ($1,000,000.00).

E. The appellant, Anna Williams, has record title to: real property; bank accounts; an automobile; and stocks and bonds, all of which property is physically present in New Hampshire, but that appellee has sole equity in this property.

F. All of the New Hampshire marital property was purchased by the appellee (with the exception of 101 shares of Occidental Petroleum--which shares were ordered returned to the appellant).

G. Only marital property deemed physically present in New Hampshire was awarded to the appellee.

H. New Castle, New Hampshire is the site of the parties' last marital domicile.

I. The appellee, William Williams, was induced to transfer all of his New Hampshire property into the appellant's name, upon the appellant's representation that she would transfer her solely held assets (her real and other property located in New York and Florida) into the parties' names jointly, which she did not do.[1]

The record further reflects that appellee, William Williams, is a life-long New Hampshire domiciliary. For a period of twenty (20) years, however, appellee was a

---

1. These findings appear in the appendix to appellant's jurisdictional statement at p. A-31.

merchant marine sea captain (employed by Isthmian Lines, Inc., New York, New York), where as part of appellee's employment appellee entered and left the country through the port of New York. This was appellee's primary connection with the State of New York.

The parties met in the summer of 1965 when appellee was returning from sea to his home in New Castle, New Hampshire, and at the same time, appellant was visiting her children of a prior marriage who were attending their regular summer camp in Ossipee, New Hampshire.

After the parties' initial meeting in New Hampshire, appellant regularly wrote, telephoned and visited appellee at this home in New Castle, New Hampshire.

In 1969, when appellee was about to return to sea, the parties were married in New York. Appellee then put out to sea, spending only two (2) months in New York between 1969 and 1971.

In 1971, as a matter of record, upon appellee's return from sea, both parties moved to New Castle, New Hampshire.

At this time, appellee transferred the real property which he had owned for several years (property facing the sea, as appellee's wish was to retire in a home facing the sea) to appellant. Appellant took out a mortgage to build a home on this real property (and appellee alone has made every mortgage payment).

Appellee transferred his stocks which he brought to the marriage to appellant, and appellee transferred his car to appellant.

During the parties' marriage, appellant, Anna Williams, would leave New Hampshire for months at a time, dividing her time between her property in Southampton (Long Island), New York, Florida and parts unknown.

During the parties' marriage, appellant's counsel advised appellee that appellee should transfer all of his property to appellant, and that she, likewise, would

transfer all of her property to appellee, as "this is the only way to be married."

In fact, as the record discloses, though appellee transferred all of his New Hampshire property to the appellant, she did not reciprocate with her New York and Florida property.

Because the appellant would not share her substantial New York and Florida property with appellee, and because of appellant's regular and prolonged sojourns away from the marital home in New Hampshire, appellee brought a libel for divorce in New Hampshire in 1979, seeking the return of the assets which appellee had transferred to appellant during the marriage.

Prior Proceedings

The appellee, William Williams, brought a libel for divorce in the Rockingham County Superior Court, in and for the State of New Hampshire, on the first day of October, 1979. Appellee sought a divorce from the bonds of matrimony solely on the grounds of

irreconcilable differences. In addition, he sought only a return to the parties' "financial status quo", and general relief.

The appellee forwarded the divorce libel to the Sheriff of Suffolk County, State of New York, for service on the appellant at her Southampton residence.

The New York Sheriff gave a non est return to the New Hampshire process.

On October 29, 1979, less than three (3) weeks after the New York Sheriff attempted to serve the appellant with the New Hampshire divorce libel (a full ten (10) years after the parties' marriage), the appellant brought her action for divorce in New York seeking a divorce on the grounds of "cruel and inhuman treatment." Further, in sharp contrast to the return to the "status quo" sought by appellee, appellant sought "alimony," "attorney's fees," "costs," "disbursements," "exclusive use of the Southampton property;" and, in an amended complaint, upon the allegation that appellee had

"converted" the New Hampshire marital property, appellant is currently seeking one hundred thousand dollars ($100,000.00) in punitive damages. (Appellant's New York divorce action has been stayed pending the outcome of this Honorable Court's decision.)

After two (2) unsuccessful attempts at serving the appellant in hand in New York with the New Hampshire divorce process, the New Hampshire Superior Court ordered that the appellant was to be served by publication and certified mail. The New Hampshire notice was duly published in appellant's New York county in accordance with New Hampshire law (N.H. RSA 458:9[2] and Superior Court Rule 146[3]), she was sent a copy of the New Hampshire divorce libel[4] by certified mail and appellant was ordered to appear in the

---

2. The text of RSA 458:9 and RSA 458:5 appears in the appendix, p. A-1.

3. Text appears in appendix, p. A-2-3.

4. See appendix to appellant's jurisdictional statement, pp. A-68-9.

Rockingham County Superior Court on the first Tuesday of April, 1980, to show cause why the divorce should not be granted.

Although the appellant personally signed the return receipt[5], she did not appear as ordered, either specially to contest the jurisdiction of the New Hampshire court, or generally. Because there was marital property at stake in New Hampshire, when the appellant did not appear as ordered the trial court ordered that a second notice of a contested hearing was to be sent to the appellant, and a new contested hearing date was scheduled. Again, the appellant did not appear.

Subsequently, appellee submitted his request for findings of fact[6] and rulings of law[7] and his proposed decree[8]. The decree

---

5. See appendix, p. A-4.

6. See appellant's Jurisdictional Statement pp. A-31-37.

7. See appellant's Jurisdictional Statement pp. A-37-39.

8. See appellant's Jurisdictional Statement pp. A-24-30.

acted in the alternative--as an order personally directing the appellant to reconvey property to appellee, or in the event appellant failed or refused to so convey the property, the decree acted in rem or quasi-in-rem against the property itself.

Appellee's request for findings of fact, rulings of law and proposed decree were granted and forwarded to the appellant in Southampton, New York.

Two (2) days prior to the expiration of the appeal period, appellant appeared specially and filed an ex parte motion to stay and set aside the decree of divorce.

On the 25th day of July, 1980, a hearing on that motion was held in the New Hampshire trial court. Both sides were heard orally, and the issues, including the application of NH RSA 458:5 III (Jurisdiction to Grant Divorce) were briefed.

As a result of that hearing, appellant's Motion to Set Aside Decree of Divorce was denied. From this ruling, appellant

appealed to the New Hampshire Supreme Court only that part of the New Hampshire divorce decree purporting to exercise personal jurisdiction over Anna Williams.

By opinion dated the tenth day of August, 1981, the New Hampshire Supreme Court, per Justice Douglas, affirmed the judgment of the trial court.

Appellant filed her timely Motion for Rehearing before the New Hampshire Supreme Court, which motion was denied without opinion. Appellant's Motion for Stay of Mandate was granted for fifteen (15) days pending appellant's appeal to this Honorable Court. Justice Brennan, by Order dated the sixteenth day of September, 1981, granted a temporary stay of the New Hampshire Supreme Court mandate, and, by Order dated the 29th day of September, 1981, Justice Brennan continued the stay during the pendency of this Honorable Court's action on the Jurisdictional Statement.

On the first day of December, 1981, appellant filed her Jurisdictional Statement, to which Jurisdictional Statement appellee respectfully submits the within Motion to Dismiss.

ARGUMENT

I. The appeal should be dismissed for lack of jurisdiction because the federal claim now made was not presented in a timely and proper fashion in the courts below and has not been passed upon by the New Hampshire Supreme Court.

In order for the appellate jurisdiction of this Honorable Court to be properly invoked, the statutory requirements of 28 USC §1257(2)[9] must be met. In enacting 28 USC §1257, Congress expressly intended, pursuant to its authority under Article III of the United States Constitution, to so limit the appellate jurisdiction of this Court. See Ex Parte McCardle, 74 U.S. (7 Wall.) 506 (1869).

---

9. The text of 28 U.S.C. §1257(2) appears in the appendix at p. A-5.

Accordingly, for 28 USC §1257(2) to obtain, the federal question for which appellant seeks review must have been "properly and timely" raised in the state court in accordance with state practice. Cardinale v. Louisiana, 394 U.S. 437(1969); In re Lamkin, 355, U.S. 59(1957); Ferguson v. Georgia, 365 U.S. 570, 572(1961). As Justice Harlan succinctly stated, "The rule that in cases coming from state courts this Court may review only those issues which were presented to the state court is not discretionary but jurisdictional." Amalgamated Food Employees Union vs. Logan Valley Plaza, 391 U.S. 308,334(1968)(dissent). (Emphasis supplied).

In this case, despite numerous opportunities to do so, at no point prior to the final judgment of the Supreme Court of New Hampshire did the appellant present the issue which in this Court[10] she frames as

---

10. See appellant's Jurisdictional Statement, p. ii.

follows:

> 1. Are New Hampshire statutes RSA 458:5 and RSA 458:9, construed by the Supreme Court of New Hampshire, in an action for divorce and division of marital property to yield in personam jurisdiction over a non-resident, nonappearing spouse not served in the forum state, impermissably vague and thereby violative of the Due Process Clause of the Fourteenth Amendment of the United States Constitution? (Emphasis supplied).

Under New Hampshire practice, appellant might have raised the issue of "void for vagueness" in her special plea at the time of filing her special appearance (the right to appear specially having been long recognized in New Hampshire practice).

Appellant might also have preserved this issue by having the question certified to the New Hampshire Supreme Court by the trial court, or, appellant could have raised the issue by filing a bill of exceptions. Indeed, under New Hampshire's liberal practice, appellant could have had this issue reviewed by the New Hampshire Supreme Court by simply having argued at any point on the

record[11] that RSA 458:5 III was "void for vagueness." However, she did not do so.[12]

---

11. The relevant part of New Hampshire Supreme Court Rule 16 reads:

> (3) So far as possible, the brief of the moving party on the merits shall contain in the order here indicated--
> (a) The questions presented for review, expressed in terms and circumstances of the case but without unnecessary detail. The statement of a question presented will be deemed to include every subsidiary question fairly comprised therein. The moving party may argue in his brief any question of law not listed in his notice of appeal, but only if he has presented a record that is sufficient for the supreme court to decide the the questions presented. (emphasis supplied).

12. At each stage in the proceedings below, appellant was presented with an opportunity to raise this federal issue. When appellant finally filed her special appearance (three (3) months after she had first been ordered to appear) she argued that she had "insufficient contacts" with New Hampshire to support a division of marital property in New Hampshire. When appellant argued orally before the trial court, she openly admitted on the record that her retained New York counsel had advised "that she must never appear in the New Hampshire matter" (hearing transcript, p. 2), even though appellant admitted (Footnote continued on next page.)

(Footnote continued from preceding page.)

that she had received two (2) notices to appear from the Rockingham Superior Court. Appellant also stated for the record that she was told that she must, instead of appearing in New Hampshire, proceed in New York and "race for jurisdiction" (Hearing Transcript, p.2), which race she could not win if she appeared in New Hampshire. Appellant then moved to set aside the New Hampshire decree, not on the ground that the New Hampshire divorce statute was "void for vagueness," but on the ground that she had suffered "accident, mistake and misfortune . . . largely due to the advice of the New York lawyers." (Hearing Transcript, p.8). This motion was denied. Appellant had yet to challenge RSA 458:5 III.

Appellant then filed a brief at the trial court stage and here appellant conceded that RSA 458:5 III was controlling, and, in a lengthy analysis of RSA 458:5 III, appellant conceded that RSA 458:5 III is a sufficient basis for the exercise of in personam jurisdiction over absent defendant's if they are absent domiciliaries, but appellant concluded in her trial court brief only that appellant didn't, as a factual matter, come within the reach of the statute because she had "insufficient contact" with New Hampshire--not that the statute is "void for vagueness."

Appellee expressly argued in his trial court brief that RSA 458:5 III was the controlling statutory authority. Appellee cited RSA 458:5 III to the trial

(Footnote continued on next page.)

Appended hereto are the Specific Questions Presented for Review to the New Hampshire Supreme Court by the appellant in her brief to that court.[13]

This Honorable Court's attention is respectfully directed to question number four (4) raised by the appellant before the New Hampshire Supreme Court, appearing as follows:

(Footnote continued from preceding page.)

court as the statutory basis for the division of the marital property, and appellee further cited Duford v. Duford, 119 N.H. 515, 403 A.2d 431 (1979) (as appellee had done at every stage of the proceedings) as the controlling judicial construction of RSA 458:5 III.

Still, when appellant framed her issues for presentation to the New Hampshire Supreme Court, appellant did not challenge the validity of RSA 458:5 III, either on its face, or as construed by the New Hampshire Supreme Court. Appellant's failure to challenge the validity of RSA 458:5 III is the reason why the New Hampshire Supreme Court opinion in this case is silent on the issue.

13. See appendix, pp. A-6-8.

> 4. If RSA 510:4 does not confer in personam jurisdiction over libelee in this case, does RSA 458:5 in conjunction with RSA 458:9 confer in personam jurisdiction over libelee, a non-resident, non-domiciliary of New Hampshire, who was served by publication and certified mail in New York and who did not appear generally in person or by attorney in the action and whose property was not attached?

This was the question presented by appellant to the New Hampshire Supreme Court for review concerning RSA 458:5 III. The New Hampshire Supreme Court answered the question as framed by the appellant in the affirmative, as had the trial court.

A review of the opinion[14] rendered in this case discloses that the issue of RSA 458:5 III being invalid, or "void for vagueness", was not treated by the New Hampshire Supreme Court.

This court has stated that when "the highest state court has failed to pass upon a federal question, it will be assumed that

---

14. The opinion below is published at 433 A.2d 1316(1981).

the omission was due to want of a proper presentation in the state courts, unless the aggreived party in this Court can affirmatively show the contrary." Street v. New York, 394 U.S. 576 at 582(1969). In other words, the burden is upon the appellant to show that she properly and timely presented the issue of RSA 458:5 III being invalid at the state court level.[15]

Appellant first raised the issue of the constitutional invalidity of RSA 458:5 III in her timely Petition for Rehearing before the New Hampshire Supreme Court. Appellant's petition was denied without opinion. The general rule is that an initial attempt to raise a federal question after judgment by

---

15. Compare United States Supreme Court Rule 15.1.(g), requiring that "[t]he statement of the case shall also specify the stage in proceedings (both in the court of the first instance and in the appellate court) at which the questions sought to be reviewed were raised, the method or manner of raising them, and the way in which they were passed upon by the court.

the highest state court, upon a petition for rehearing, comes too late, unless the state court actually entertains, and decides, the federal question. Cox Broadcasting Corporation v. Cohn, 420 U.S. 469 at 476(1975).

One of the few exceptions to this general rule is the instance where the ruling of the highest state court could not have been anticipated, and a petition for rehearing presented the first opportunity for raising the (federal) claim. Herndon v. Georgia, 295 U.S. 441(1935). Appellant argues that she fits within this judicial exception to the general rule.[16]

Thus, the issue before this Honorable Court (the resolution of which will be dispositive of the question of whether or not jurisdiction for an appeal exists) is whether the appellant should have reasonably anticipated the ruling which she attacks in

---

16. Appellant's Jurisdictional Statement, p. ii.

this Court; if the answer is in the affirmative, this exception is unavailable to appellant and her appeal must be dismissed.

Appellee submits that the construction placed upon RSA 458:5 III by the New Hampshire Supreme Court in the opinion below was not novel, and should therefore have been anticipated by the appellant as controlling in her case.

RSA 458:5 III was similarly construed in the New Hampshire case of Duford v. Duford, 119 NH 515, 403 A.2d 431(1979), as follows:

> RSA 458:5 III provides that jurisdiction over the parties exists "[w]here the plaintiff was domiciled in the state for one year next preceeding the time when the action was commenced." Plaintiff meets this requirement, and service being properly made in accordance with RSA 458:9, personal jurisdiction attaches under RSA 458:5. Federal constitutional requirements, however, must also be met. Shaffer v. Heitner, 433 U.S. 186(1977); International Shoe Co. v. Washington, 326 U.S. 310(1945). The defendant was married in New Hampshire, fathered a child here, and lived in this State with the plaintiff as husband and wife. The record before us shows that New Hampshire is still his domicile, although he may presently be elsewhere.
>
> We have no hesitancy in holding that the defendant has more than the minimum contacts

with this State to satisfy the requirements of International Shoe Co. v. Washington, 326 U.S. 310(1945); See Nickas v. Nickas, 113 NH 261, 306 A.2d 51(1973); cf. Kulko v. Superior Court, 436 U.S. 84,92(1978)(denying in personam jurisdiction in a domestic relations case where the "quality and nature" of the defendant's activities within the forum State were insufficient to make it "reasonable and fair" to require him to subject himself to the forum State's jurisdiction).

This ruling makes the construction of RSA 458:5 III plain: New Hampshire permits utilization of RSA 458:5 III as a source of personal jurisdiction over absent defendants in marital actions as long as federal constitutional requirements are met, as set forth above. In all major respects, as the record shows, the facts of the instant case come within the purview of the holding in Duford, supra.

The opinion in Duford stated that in addition to the defendant's other contacts, i.e. defendant was married, fathered a child, and lived with plaintiff as husband and wife in New Hampshire, the record reflected that New Hampshire was still the ab-

sent defendant's domicile. Similarly, in the instant case, the trial court found that New Hampshire was the appellant's last marital domicile, and that appellant's contacts with New Hampshire were substantial.

Duford did not hold, as appellant contends, that absent defendants are required to be domiciliaries as a prerequisite to personal jurisdiction attaching under RSA 458:5 III, but only that "federal constitutional requirements . . . must also be met." id., at 515, 403 A.2d at 431. In other words, under Duford, domicile is not a controlling factor, but rather is evidence of sufficient contacts with the forum state. Though Duford is distinguishable on this particular fact, as noted above, the distinction is without significance; the instant case still comes within the holding of Duford, as appellant's contacts were found to be sufficient for the exercise of personal jurisdiction over appellant to comport with federal due process requirements.

Thus, since the disposition of appellant's case was clearly controlled by the Duford holding, and therefore not novel, appellant should have anticipated this ruling in her case and attacked RSA 458:5 III as "void for vagueness" prior to her Petition for Rehearing.

In Herndon v. Georgia, 295 U.S. 441,443-446(1935), supra, this Court, in analyzing whether the appellant was entitled to avail herself of the exception to the general rule that "an attempt to raise a federal question after judgment, upon a Petition for Rehearing, comes too late," held that the exception was not available, where the construction given a statute by the State's highest court had, in substance, also been given to the same statute in a decision rendered several months prior, and therefore such decision should have been anticipated. This Court in its holding stated:

> Appellant, of course, cannot plead ignorance of the ruling in the Carr [prior] case, and was therefore bound to antici-

> pate the probability of a similar ruling in his own case, and preserve his right to a review here by appropriate action upon the original hearing in the court below. It follows that his contention that he raised the federal question at the first opportunity is without substance, and the appeal must be dismissed for want of jurisdiction. Id., at 446.

Indeed, appellant was not ignorant of the Duford holding. RSA 458:5 III and the Duford ruling were cited by both parties at every stage in the proceedings below. Appellant argued at every turn that Duford was distinguishable because the defendant therein was, in addition to his other contacts, also a domiciliary of New Hampshire. The very vigor with which appellant sought to distinguish Duford is evidence that the New Hampshire Supreme Court ruling in Duford was anticipated by appellant to be controlling.

Moreover, appellant should not be heard to say she "could not reasonably have anticipated" RSA 458:5 III being construed to provide jurisdiction over the appellant, for she framed this question to the New

Hampshire Supreme Court. Thus, it is apparent that the appellant anticipated a ruling on this issue.

The Duford holding is not modified in any substance by the instant case. Even assuming, arguendo, that appellant had cause to raise the "void for vagueness" claim, she had virtually equal cause and sufficient opportunity to raise it prior to her Petition for Rehearing on the basis of the Duford ruling.

Thus, where the appellant failed to attack RSA 458:5 III as being constitutionally infirm in her brief before the New Hampshire Supreme Court, and, the record below is silent on this issue, this Court is without jurisdiction to grant an appeal.

This conclusion is true where the appellant had ample opportunity to raise the issue below, and where the construction of RSA 458:5 III complained of here was not novel and should therefore have been anticipated. Therefore, appellant has failed to meet her burden of showing that she pre-

sented her constitutional issue in a timely fashion and her appeal should be dismissed.

II. The appeal should be dismissed for failure to present a substantial federal issue.

The extension of jurisdiction over the non-resident, non-appearing appellant by the New Hampshire Court to dissolve the parties' marriage and restore the New Hamphsire marital property to the appellee raises no substantial federal issue where the appellant's contacts with the forum were found to be "regular" and "substantial" and the appellant ignored two actual notices of the pending New Hampshire action in order to proceed in New York.

A. New Hampshire's Enabling Authority

The New Hampshire Supreme Court opinion in Duford v. Duford, 119 NH 515,403 A.2d 431(1979) construed RSA 458:5 III to be enabling authority for the exercise of jurisdiction over non-resident defendants in

divorce cases.[17]

Such judicial construction of RSA 458:5 III in Duford, id., and in the instant case, (both of which cases rely upon this construction of the statute) is binding upon this Honorable Court. Albertson v. Millard, 345 U.S. 242,244(1953); Kingsley Pictures Corp. v. Regents, 360 U.S. 684,686(1958); Aero Transit Co. v. Comm'rs, 332 U.S.

---

17. Supra, in text at pp. 22, 23. In this context, note that in Leeper v. Leeper, 114 NH 294, 319 A.2d 626(1974) the court stated:

> "When the rules governing jurisdiction were liberalized in International Shoe Co. v. Washington, 326 U.S. 310(1945), and its progeny, this court wholly adopted their rationale and determined that jurisdiction over nonresidents would be exercised to the full constitutional limit. [Citation omitted]. In searching for this constitutional limit, the court has identified two important considerations by which it would test the correctness of a lower court's decision to grant or withhold jurisdiction. First, the exercise of jurisdiction has to be reasonable from the standpoint of New Hampshire's interest in the litigation. Second, it has to be consistent with the principles of fair play and substantial justice."

495,501,502(1947) and cases cited therein. See, Great Northern Railway Co. v. Sunburst Oil and Refining Co., 287 U.S. 358,362 (1932). In this context, this Court has stated:

> ". . . we are bound by the decision of that [state] court as though the meaning as fixed by the court had been expressed in the statute itself in specific words. [citations] Guaranty Trust Co. v. Blodgett, 287 U.S. 509,513 (1932).

While RSA 458:5 III on its face purports to allow the courts of New Hampshire to exercise jurisdiction over both parties merely if the plaintiff is domiciled in New Hampshire for one year, the New Hampshire Supreme Court has made expressly clear the requirement that the application of this statute to obtain jurisdiction over non-residents must conform to the requirements of federal due process.

Thus, the language of RSA 458:5 III as a source of authority for obtaining jurisdiction over non-resident defendants in marital cases was expressly narrowed in Duford's

holding to make the application of this statute to non-residents conform to federal constitutional requirements.

Since this judicial construction of RSA 458:5 III is a matter of state law, and well settled, the remaining issue is whether or not the application of RSA 458:5 III in this instance violated federal law. Though this Court is bound by New Hampshire's construction of this statute, this Court's province, of course, is to decide the federal due process questions. See United States v. Burnison, 339 U.S. 87(1950).

A proper resolution of this issue (whether or not New Hampshire had jurisdiction to grant the divorce and dispose of the marital property) requires an examination of the federal due process constraints on the exercise of such state court jurisdiction over non-residents.

B. Federal Constraints

Historically, a state's power to adjudicate was predicated upon notions of "power"

and depended upon the physical presence of the defendant within the territorial limits of the rendering state. Pennoyer v. Neff, 95 U.S. 714(1877).

A state's authority to adjudicate gradually shifted from reliance upon such "mechanical" notions of presence, to a factual analysis that looks to the relationship of the defendant to the forum and makes inquiry into whether it is "reasonable" and "fair" to make the non-resident appear and defend. International Shoe Co. v. Washington, 326 U.S. 310(1945).

Despite the resulting expansion of jurisdiction to reach non-residents (e.g., in interstate contract and tort cases), the territorial limitation of Pennoyer v. Neff, supra, still appeared to obtain in the domestic relations area of the law.[18]

---

18. Long-Arm Jurisdiction In Alimony and Custody Cases, 73 Col.L.Rev. 289(1973).

Although long-arm statutes were enacted in the wake of International Shoe to reach non-residents in tort and contract actions, state courts seemed reluctant, in light of the historical context of International Shoe, to apply the rationale of the "transacts any business" or "commits a tortious act" language of the long-arm statutes to claims arising out of the marital relation, and courts were thus unwilling to extend jurisdiction to non-residents in such cases.[19] The anomalous result was, that while a single telephone call in a commercial context was found to enough contact to subject a non-resident to the jurisdiction of the court, see O'Hare International

---

19. However, some state courts did so. The first case which appears to have utilized its "long-arm" power in this context is Soule v. Soule, 193 Cal.App.2d 443, 14 Cal. Rptr. 417(1961). The facts in that case are similar to the case at bar. Other states simply amended their long-arm statutes. See Long-Arm Jurisdiction in Alimony and Custody Cases, supra, 73 Col.L.Rev. 289,299 n.83 and accompanying text.

Bank v. Hampton, 437 F.2d 1173(7 Cir. 1971), the presence of significant marital property and a spouse's family in the state did not constitute enough contact to reach a fleeing spouse. See Stanley v. Stanley, 271 A.2d 636(Me. 1970); Mroczynski v. McGrath, 34 I11. 2d 451, 216 N.E. 2d 137(1966).

The only generally judicially recognized way to obtain jurisdiction over an absent spouse, if he or she wasn't still a domiciliary of the rendering state, was to serve him, or her, in hand within the forum state, thus invoking the old Pennoyer v. Neff, supra notions that physical presence was a prerequisite to the perfection of jurisdiction. See Armstrong v. Armstrong, 350 U.S. 568(1955) where it was stated:

> "It has been the constitutional rule in this country, at least since Pennoyer v. Neff, 95 U.S. 714, decided in 1878 that non-residents cannot be subjected to personal judgments without such [in-state] service or appearance."[20]
>
> 350 U.S. at 576

---

20. Appellant relies on Armstrong, id., (Footnote continued on next page.)

Indeed, this result still occurred a full ten (10) years after International Shoe was decided. However, the traditional rigid rule requiring physical presence within the state

---

(Footnote continued from previous page.)

along with Estin v. Estin, 334 U.S. 541 (1948) and Vanderbilt v. Vanderbilt, 354 U.S. 416(1957) for the proposition that New Hampshire may not exercise jurisdiction over non-residents in marital cases. These cited cases do not apply, however, where the rendering state has a sufficient factual basis for acquiring jurisdiction over the non-resident, as in the instant case. In Estin, supra and Vanderbilt, supra the fleeing spouse (in contrast to the instant case) sought an ex parte divorce in Nevada in which state the stay-at-home wife had never set foot, or had any contact.

Thus, Nevada was found to have no jurisdiction over the absent wife who had never appeared in Nevada. Here, Appellant is the "fleeing" spouse, who has substantial contact with New Hampshire. Armstrong, supra was decided under the Pennoyer v. Neff doctrine of "presence" and that decision relied, in part, on the requirement of "in-state" service of process as a prerequisite to the perfection of jurisdiction, not on the "affiliating circumstances" analysis that now obtains in light of International Shoe and its progeny.

sovereign's territorial limits was gradually eroded to the point where this Court remarked: "a trend is clearly discernable toward expanding the permissable scope of state jurisdiction over foreign corporations and other non-residents." McGee v. International Life Insurance Co., 355 U.S. 220,222(1957).

This trend commenced with International Shoe Co. v. Washington, 326 U.S. 310(1945) and its continuance is apparent in such cases as Hanson v. Denckla, 357 U.S. 235(1958); McGee v. International Life Insurance Co., supra; and Travelers Health Association v. Virginia, 339 U.S. 643(1950).

The emerging basis for assertion of jurisdiction over non-residents generally focused on three related areas: 1) the nature and extent of the defendant's connection with the state;[21] 2) the interest

---

21. Hanson v. Denckla, 357 U.S. 235,251,253 (1958).

of the parties in having their claim litigated in a particular forum;[22] 3) the interests of the state in providing the plaintiff with an effective means of redress.[23]

The old notion that "physical presence" is a necessary prerequisite to the exercise of state court jurisdiction over non-residents appears to have been completely eroded.

Finally, in Shaffer v. Heitner, 433 U.S. 186(1977) this Court held:

> "We therefore conclude that all assertions of state-court jurisdiction must be evaluated according to the standards set forth in International Shoe and its progeny." id. at 212.
>
> ". . . To the extent that prior decisions are inconsistent with this standard, they are overruled." id., 212, n. 39 (emphasis supplied).

Thus, it now appears to be the rule that each exercise of state court jurisdiction is

---

22. McGee v. International Life Ins. Co., 355 U.S. 220,222-24(1957).

23. McGee, id., and Travelers Health Association v. Virginia, 339 U.S. 643 (1950).

subject to the rules of "reasonableness" of International Shoe and its progeny, and that the constitutionality of any particular state court's pronouncement on the issue of whether jurisdiction exists over a non-resident in a particular case must be judicially evaluated in the light of such rule.

This Honorable Court has stated that "like any standard that requires a determination of 'reasonableness' the 'minimum contacts' test of International Shoe is not susceptible of mechanical application; rather, the facts of each such case must be weighed to determine whether the requisite 'affiliating circumstances' are present. Kulko v. California Superior Court, 436 U.S. 84,92(1978), citing Hanson v. Denckla, 357 U.S. 235,246(1958).

C. Appellant's Contacts with New Hampshire

Turning then to the facts of the instant case, it is apparent that the appellant had regular and substantial contact with New Hampshire over the course of her marriage

with the appellee.

The following appears from the record below:

> Initially, the parties met while they were en route to New Hampshire on an airplane. Appellee was returning from sea, while the appellant was in New Hampshire to visit her children who attended private school in Concord, New Hampshire, and who were then attending their regular summer camp in Ossipee, New Hampshire (which camp they attended for five successive summers). During the parties' courtship, the appellant made numerous telephone calls to the appellee here in New Hampshire, corresponded frequently, and continued to make frequent visits to New Hampshire.
>
> Upon appellee's return to sea in 1969, the parties were married in New York. During the two-year period from 1969 to 1971, the appellee spent eleven

months out of each year at sea.[24] Because appellee had conveyed the title of his New Hampshire real property to appellant, she signed a mortgage and note with a New Hampshire bank (although appellee has made every payment).

Appellant, Anna Williams, borrowed money from the Piscataqua Bank of Portsmouth, New Hampshire (where she had both a personal and joint checking account) to furnish the house, and appellant had record title to the MGB sports car recorded in Concord, New Hampshire. Appellant concedes that the above is true, and admits such in her responsive pleadings.

Additionally, appellant spent many months out of every year for eight (8) years of the parties' marriage living

---

24. While appellant refers to New York as the "marital domicile", appellee actually spent but a total of two (2) months there.

with appellee in New Hampshire as man and wife.

Although the appellee has made all payments on the loans obtained in New Hampshire, it is apparent that appellant has engaged in numerous financial transactions in New Hampshire arising out of the marital relationship, and that she has record title to both real and personal property in New Hampshire, which property forms the sole subject of the within dispute.

Appellee respectfully submits to this Honorable Court that appellant's contacts with New Hampshire, when viewed in the light of the applicable constitutional standard, are sufficient to support the New Hampshire Court's exercise of jurisdiction over her.

In this regard, this Court has stated:

> "It is essential in each case that there be some act by which the defendant purposely avails [herself] of the privilege of conducting activities within the forum state . . ." Hanson v. Denckla, 357 U.S. 235,253(1958).

New Hampshire has held that cohabitation

invokes the protection of state law. See Nickas v. Nickas, 113 NH 261,265, 306 A.2d 51, 54(1973). Additionally, the parties' holding joint title to property, bank accounts, and a certificate of deposit in a New Hampshire bank is evidence that the appellant further purposely availed herself of conducting activities in New Hampshire, thus invoking the protection of New Hampshire law. Appellant returned to and left New Hampshire, year in, year out, for eight (8) years.

As this Court observed in International Shoe,

> "Applying these standards, the activities carried on in behalf of Appellant in the State of Washington were neither irregular nor casual. They were systematic and continuous throughout the years in question."
>
> id., at 320.

Appellant's contacts with New Hampshire, as found by the trial court and upheld by the New Hampshire Supreme Court, likewise were "systematic and continuous."[25]

---

25. Footnote on following page.

D. Notice to the Appellant

With respect to the sufficiency of notice to the appellant, this Honorable Court's attention is respectfully directed to Certified Mail Receipt Number 923340, a photocopy of which is appended hereto,[26] which forms a part of record and which was duly signed by the appellant and evidences her actual notice of the pending divorce. (After two attempts at in-hand service had

---

25. In her Jurisdictional Statement to this Honorable Court, appellant (p. 62 of Jurisdictional Statement) continues in this Court, as she did before the New Hampshire Supreme Court, to characterize her presence in New Hampshire as "visits." During oral argument on this issue before the New Hampshire Supreme Court, Justice Douglas repeatedly questioned counsel for the appellant on the nature of these "visits." When asked by Justice Douglas if it were true that she spent up to six months out of some years living with appellee as man and wife in New Hampshire, appellant did not answer, but after Chief Justice Grimes repeated the question to counsel for the appellant, counsel responded in effect, "Yes, she did but to find personal jurisdiction on that basis would be a missapplication of the International Shoe doctrine."

26. See appendix, p. A-4.

failed, the New Hampshire Superior Court ordered that appellant was to be served by certified mail, and publication). In addition, a second copy of the divorce libel was sent to appellant's nearest relative, which copy was returned, marked "refused".

At the first hearing, when appellant failed to appear, the court ordered that the hearing be rescheduled, and that a second notice was to be sent. Again, appellant failed to appear.

Appellant then specially appeared twenty-eight days later, and asked that the decree be set aside. At the hearing to set aside the decree, the appellant admitted through her attorney that she had actual notice of the New Hampshire proceeding, but that on the advice of retained New York counsel she was to ignore the New Hampshire proceeding in order to proceed with her subsequently commenced divorce action. The relevant part of the hearing transcript reads as follows:

> "Mr. Kalled [appellant's local counsel] . . .'so, your Honor, essentially she (Anna Williams) tells me the reason why she never came to New Hampshire is that she got advice from the firm of Del Rosso, 11146 Old Country Road, Mineola, New York 15501.
>
> Apparently, the situation is one where there was a race for jurisdiction. There were actions both in New York, and in New Hampshire, and as part of the general advice that Mr. Del Rosso gave to my client, part of which was that she must never appear in the New Hampshire matter . . .'" (See Transcript, pg. 3).

There can be no doubt that the decision of the appellant not to appear in the New Hampshire matter was calculated to derive benefit for the appellant by deliberately seeking more advantageous relief in the New York forum.

The appellant clearly had a duty to appear initially upon receipt of the New Hampshire process, even if such appearance were in the nature of a special appearance to contest the jurisdiction of the Court--the right to file a special appearance is recognized by New Hampshire practice.

Appellant takes issue with the relief granted in light of the relief requested in the libel; however, the libel states in pertinent part:

> "IV. That the parties hereto entered into the marriage each owning substantial assets.
>
> Wherefore . . .
>
> (2) That the financial assets of the parties be restored to the status quo which existed prior to the marriage, and
>
> (3) For such other and further relief as may be just."

It is clear from appellant's response to the libel that she was acutely aware of the property at issue, for her counsel immediately wrote to every company in which appellee owned stock and threatened the transfer agents with suit for "actual and punitive damages" if they released any dividends to the appellee.

Further, and without benefit of any judicial process, appellant, through counsel, wrote the New Hampshire bank where appellee had his account and threatened the

bank with suit if they released funds. Appellant then commenced suit in New York, seeking $100,000.00 in punitive damages against appellee for alleged conversion of marital assets. From appellant's acts, she is estopped to deny her awareness of the scope of the relief sought.

III. The decision below gave full consideration to the issues, decided them correctly, and the result is fair.

Appellee, a 70 year old retired sea captain, sought to terminate his marriage and adjudicate his property interests in his New Hampshire marital property.

Appellant, a woman of independent wealth and a resident of Southampton, New York, would not appear to be heard in New Hampshire, but instead, after the New Hampshire divorce was commenced, immediately brought a separate action for divorce in New York.

Appellee asked the trial court in New Hampshire to restore the parties to the

respective financial conditions that existed before the marriage. (Appellant entered the marriage with assets far in excess of appellee). Appellee sought none of appellant's solely held property in New York or Florida. Indeed, appellant disposed of significant property without accounting to appellee for the proceeds.

Appellant's counsel of long standing handled the transfer of appellee's property into appellant's name--but at no time did appellant reciprocate.

If the New Hampshire decree is overturned, and appellant is thereby allowed to continue with her pending divorce action in New York, under New York title laws, she apparently will be entitled to keep all of her solely held property, and yet, acquire one-half of appellee's New Hampshire property, while appellee would be without a forum in which to litigate his interests.

Indeed, appellant has contacted every company in which appellee owns stock (all of

which stock he brought to the marriage, and some of which was purchased with appellee's hazardous duty pay) and frozen the dividends. Appellee is now living on his seaman's pension, as all of his assets have been tied up in divorce litigation by appellant, while none of her assets have been sought after at all by appellee.

Further, if the New Hampshire decision is overturned on the ground that jurisdiction could not be acquired over appellant, appellant still has a court order purporting to transfer title in rem back to him with respect to the house and all of his personal property. What will become of this aspect of the decree? Further and seemingly (to appellee) endless litigation will ensue.

Appellee should not be forced to go to New York where he has little connection, to defend his New Hampshire property, and defend a suit for $100,000.00 punitive damages based upon "conversion" of marital property.

The New Hampshire Courts had all of these issues presented to them, and the New Hampshire decree effectively ends this controversy. Overturning the New Hampshire Supreme Court, which gave full consideration to the issues and decided them fairly, will lead to further litigation, both in New Hampshire and New York, further court appeals, and result in greatly unjustified deprivation to the appellee.

Upholding the New Hamphsire Supreme Court decree will, it is respectfully submitted, sanction a result that is fair, just and reasonable.

CONCLUSION

For the foregoing reasons, the appeal should be discussed, and/or the petition for a writ of certiorari should be denied.

DATED: January 21, 1982

Respectfully submitted:

BARRY M. SCOTCH, ESQ.
Counsel of Record
1000 Elm Street
Manchester, N.H. 03101
(603) 668-8100

MARSHALL D. HICKOK, ESQ.
Counsel for Appellee
65 West Merrimack Street
Manchester, N.H. 03101
(603) 627-3032

APPENDIX

APPENDIX

NH RSA 458:9 Venue: Notice. All libels for divorce shall be brought in the county in which the parties, or one of them, live, and before the superior court; and the notice of the pendency thereof shall be given to the libelee, personal or otherwise, as the court shall order.

NH RSA 458:5 Over Parties. Jurisdiction of the parties exists in the following cases only:

I. Where both parties were domiciled in the state when the action was commenced.

II. Where the plaintiff was so domiciled and the defendant was personally served with process within the state.

III. Where the plaintiff was domiciled in the state for one year next preceding the time when the action was commenced.

IV. Where the domiciled plaintiff has filed a libel the non-domiciled defendant may have affirmative relief upon filing a cross libel.

SUPERIOR COURT RULES

146. When the residence of the libelee is unknown, the libel shall state the libelee's last known post-office address, and the name and post-office address of some near relative of the libelee, if any, is known to the libelant, and otherwise the name and post-office address of some friend of the libelee, such facts to be verified by the libelant's personal affidavit filed with the libel. Service may then be ordered as follows: there shall be publication in a newspaper published at or nearest the libelee's last known place of residence in this State, if any, and otherwise as the Court may order, the last publicatiion to be at least fourteen days prior to the return dat and in the form prescribed by law, with a statement showing that it is a libel for divorce, and the prayers, if any, relative to the custody of children, alimony, support and other relief; also, the Clerk shall send

by registered or certified mail, with request for a return receipt, a copy of the libel and order attested by him, within seven days after filing, to the libelee and to such relative or friend.

NH RSA 510:4 Nonresident Defendant. Jurisdiction. Any person, who is not an inhabitant of this state, and who in person or through an agen transacts any business within this state, commits a tortious act within this state, or has the ownership, use, or possession of any real or personal property situated in this state, submits himself, or his personal representative, to the jurisdiction of the courts of this state as to any cause of action arising from or growing out of the acts enumerated above.

PS Form 3811 AUG. 1978 RETURN RECEIPT, REGISTERED, INSURED AND CERTIFIED MAIL

● SENDER: Complete items 1, 2, and 3.
Add your address in the "RETURN TO" space on reverse.

E1774-79

1. The following service is requested (check one):
- [X] Show to whom and date delivered.....¢
- ☐ Show to whom, date, and address of delivery....¢
- ☐ RESTRICTED DELIVERY
  Show to whom and date delivered.....¢
- ☐ RESTRICTED DELIVERY.
  Show to whom, date, and address of delivery.$
  (CONSULT POSTMASTER FOR FEES)

2. ARTICLE ADDRESSED TO:

Anna Williams
12 Hamilton Place
Garden City, N.Y.

3. ARTICLE DESCRIPTION:

REGISTERED NO.	CERTIFIED NO.	INSURED NO.
	923340	

(Always obtain signature of addressee or agent)

I have received the article described above.
SIGNATURE ☐ Addressee ☐ Authorized agent

Anna Williams

4. DATE OF DELIVERY — POSTMARK

CITY NY FEB 20 1980 USPO

5. ADDRESS (Complete only if requested)

6. UNABLE TO DELIVER BECAUSE: — CLERK'S INITIALS

☆GPO : 1978- 272-932

A TRUE COPY-ATTEST
CLERK

280 U.S.C. §1257. State courts; appeal; certiorari. Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

> (2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

QUESTIONS PRESENTED FOR REVIEW

1. Does the due process clause of the Fourteenth Amendment of the United States Constitution demand that in personam jurisdiction over a person be acquired in order to divest said person of title to personalty and realty located in the forum state in a division of marital property in a divorce action?

2. Is New Hampshire's long-arm statute, RSA 510:4 applicable to give in personam jurisdiction over a non-resident in an action for divorce and distribution of marital property wherein the libelee, a non-resident, nondomiciliary of New Hampshire, was served with a libel for divorce by certified mail and publication in the State of New York and who did not appear generally in the action in person or by attorney and whose property was not attached by any process?

3. Assuming arguendo that RSA 510:4 is applicable to this case,

(a) was libelee accorded due notice of the intent of the libelant to divide all marital property no matter when acquired and not just a return to status quo as existed at the time of the marriage as demanded in the divorce libel; and

(b) does libelee have sufficient contacts with the State of New Hampshire concerning libelant's cause of action for divorce so as to satisfy the constitutional mandate of due process thereby compelling libelee to defend this action in the forum state?

4. If RSA 510:4 does not confer in personam jurisdiction over libelee in this case, does RSA 458:5 in conjunction with 458:9 confer in personam jurisdiction over libelee, a non-resident, non-domiciliary of New Hampshire, who was served by publication and certified mail in New York and who did not appear generally in person or by attorney in the action and whose property was not attached?

5. If there was no New Hampshire statute which conferred in personam jurisdiction over libelee, was the due process clause of the Fourteenth Amendment violated by the Superior Court's divorce decree which in part ordered libelee to convey to libelant her interests in realty and personalty either jointly owned by the parties or owned solely by libelee, all located in the forum state, that is, by certified mail and publication in New York, there being no appearance generally by libelee in the forum in person or by attorney and there being no attachment by any process of the libelee's property located in New Hampshire?